

# **TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1869.**

**No. 525.**

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**WORTH BROTHERS COMPANY, PETITIONER,**

**vs.**  
**EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.**

---

**ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.**

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(27,280)

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vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE THIRD CIRCUIT.

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a Certified Copy.

TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals for the Third Circuit,  
March Term, 1919.

No. 2465.

WORTH BROTHERS COMPANY, Plaintiff-in-Error,

v.

EPHRAIM LEDERER, Collector of Internal Revenue for the First District  
of Pennsylvania, Defendant-in-Error.

In Error to the District Court of the United States for the Eastern  
District of Pennsylvania.

Filed April 8, 1919.

1 In the District Court of the United States for the Eastern  
District of Pennsylvania, September Term, 1918.

No. 5738.

WORTH BROTHERS COMPANY

v.

EPHRAIM LEDERER, Collector of Internal Revenue for the First  
District of Pennsylvania.

Docket Entries.

Francis Fisher Kane.

A. H. Wintersteen.

Oct. 7, 1918. Præcipe for Summons exit.  
" 7, " Summons exit—returnable first Monday in November, 1918.  
" 7, " Statement of Claim filed.  
" 7, " Exhibits A, B, C, D, E, F, G, H and I filed.  
" 7, " Notice to file Affidavit of Defense filed.  
" 8, " Appearance of Francis Fisher Kane, Esq., for defendant, filed.  
" 14 " Summons returned "served" and filed.  
" 16, " Affidavit of Defense filed.

## WORTH BROS. CO. VS. EPHRAIM LEDERER, ETC.

Nov. 19, 1918. Order to place case on Trial List filed.  
 " 22, " Stipulation by Counsel waiving trial by jury filed.

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Nov. 22, 1918. Order to place case on Argument List filed.  
 Jan. 27, 1919. Stipulation as to Agreed-upon Facts, filed.  
 " 29, " Trial before Court without a Jury.  
 " 30, " Trial concluded.

Feb. 6, 1919. Testimony filed.  
 " 6, " Plaintiff's Exhibits Nos. 1, 2, 15, 16 and 17 filed.  
 " 28, " Plaintiff's Requests for findings of Fact and Law, filed.  
 " 28, " Defendant's Conclusions of Fact and Law, filed.  
 " 28, " Defendant's additional Conclusions of Law filed.  
 " 28, " Opinion, Thompson, J., awarding judgment for defendant, filed.

Mar. 11, 1919. Praecept to enter judgment in favor of defendant filed.  
 " 11, " Judgment filed.  
 " 26, " Plaintiff's Exceptions to rulings of the Court, filed.  
 " 26, " Order of Court allowing Exceptions, filed.  
 Apr. 3, 1919. Bill of Exceptions, filed.  
 " 3, " Order of Court sealing Bill of Exceptions, filed.  
 " 3, " Assignments of Error filed.  
 " 3, " Petition for Writ of Error filed.  
 " 3, " Order of Court allowing Writ of Error filed.  
 " 3, " Bond sur Writ of Error filed.  
 " 3, " Order of Court approving Bond sur Writ of Error filed.  
 " 3, " Writ of Error allowed and copy thereof lodged in Clerk's office for adverse party.

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Apr. 3, 1919. Citation allowed and issued.  
 " 3, " Citation returned "service accepted" and filed.  
 " 4, " Stipulation for Transcript of Record sur Writ of Error, filed.

*Writ of Error.*

(Filed April 3, 1919.)

UNITED STATES OF AMERICA, ~~ss~~:

The President of the United States to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Worth Brothers Company and Ephraim Lederer, Collector of Internal Revenue, a manifest error hath hap-

pened, to the great damage of the said Worth Brothers Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the city of Philadelphia within thirty days in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected,  
4 the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the third day of April, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.]

GEORGE BRODBECK,  
*Clerk of the District Court of the United States.*

Allowed by:

J. W. THOMPSON, J.

In the District Court of the United States for the Eastern District of Pennsylvania, September Sessions, 1918.

No. 5738.

WORTH BROTHERS COMPANY, a Corporation of the State of Pennsylvania and a Citizen Thereof, Plaintiff,

v.

EPHRAIM LEDERER, Collector of Internal Revenue for the 1st District of Pennsylvania, Defendant.

*Plaintiff's Statement of Claim.*

(Filed Oct. 7, 1918.)

The plaintiff claims to recover from the defendant \$74,857.07, with interest from July 25th, 1917, upon a cause of action, of which the following is a statement:

1. The plaintiff is a corporation duly organized under the laws of the State of Pennsylvania and a citizen thereof. The defendant is the United States Collector of Internal Revenue for the First District of Pennsylvania, being duly commissioned as such pursuant to the laws of the United States of America.  
5

2. By Section 301 of Title III of the Act of Congress of September 8th, 1916, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for each taxable year commencing with the taxable year ended December 31st, 1916, in addition to the income tax imposed by Title I of said Act, was imposed upon every person manufacturing

"(a) Gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells, or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles, and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e)."

By Section 304 of said Act each person manufacturing articles specified in said Section 301 is required to make return, under oath, on or before the first day of March, 1917, showing the gross and net amount of income received or accrued from the sale or disposition of the articles specified in said Section 301, the income from which was made taxable in and by said Section.

3. The plaintiff was and is advised by its counsel, as matter of law, upon the facts submitted to said counsel, that, during the taxable year ended December 31st, 1916, it did not manufacture any of the articles or parts of the articles specified in Section 301 of said Act, and that it was, therefore, not required to make any return under Section 304 of said Act. It so reported or made return to the defendant on February 28th, 1917. A copy of its said Report or Return is hereto annexed and made a part hereof as "Exhibit A."

4. During the taxable year 1916, the plaintiff manufactured certain products known as rough shell forgings, and sold the same to The Midvale Steel Company, by which company their manufacture was further proceeded with and completed, and they were then used as part of material entering into the fabrication of completed shells supplied by said The Midvale Steel Company to the Government of the Republic of France. On May 31st, 1917, a Munitions Agent of the United States, acting under instructions of the United States Commissioner of Internal Revenue, made written claim of the plaintiff that the said rough shell forgings manufactured by the plaintiff during said year 1916, were shells or parts of shells and, as such, subject to the munitions manufacturers' tax, and demanded that the plaintiff file an Amended Return, showing the facts and results from its manufacture of said forgings. A copy of said Claim or Demand is hereto annexed, and made a part hereof as "Exhibit B."

5. In obedience to said Demand, the plaintiff, on May 31st, 1917, filed an Amended Return, a copy of which is hereto annexed, and made a part hereof as "Exhibit C." The plaintiff accompanied the

filing of said Return with the filing of a formal, written Protest against its liability to make said Return, and against the claim that the said rough shell forgings manufactured by it were shells or parts of shells within the intent and purpose of the Act; in which  
7 Protest it was definitely claimed that the plaintiff was not the subject of any lawful demand for payment of any taxes under the said Munitions Manufacturers' Tax Law, for the said year ended December 31st, 1916. A copy of said Protest is hereto annexed, and made a part hereof as "Exhibit D."

6. On June 30th, 1917, the defendant, acting under instructions of the Commissioner of Internal Revenue, sent the plaintiff a written Notice and Demand of assessment against it of certain munitions manufacturers' taxes for the year ended December 31st, 1916, based upon the figures set forth in said Amended Return so as aforesaid filed under protest—the taxes assessed being \$74,857.07, upon the basis of twelve and one-half per centum of the net profits shown by the plaintiff in its said Amended Return, derived from the manufacture and sale by it of said rough shell forgings. Said Notice and Demand recited that demand was made for the payment of said taxes on or before the due date named therein, which was stated as July 30th, 1917; and that failure to do so would cause a 5 per cent penalty to accrue, with interest at 1 per cent per month until paid.

7. Pursuant to said Notice and Demand the plaintiff on July 25th, 1917, paid to the defendant the taxes so as aforesaid assessed, \$74,-857.07, and at the same time filed with the defendant a written Protest against its liability to pay the same or any part thereof. A copy of said Protest is hereto annexed, and made a part hereof as "Exhibit E." The defendant, on said date, acknowledged, in writing, the receipt of said payment and Protest, a copy of which Acknowledgment is hereto annexed, and made a part hereof as "Exhibit F."

8. Subsequently, on July 27th, 1917, the plaintiff filed with the defendant, for presentation to the Commissioner of Internal Revenue, a Claim for Refund of the amount so as aforesaid assessed and paid. A copy of said Claim for Refund is hereto annexed, and made a part hereof as "Exhibit C."

9. On the said date the defendant, by his Deputy Collector, Ellis Lewis, acknowledged the filing of said Claim for Refund, by endorsement on the original Notice and Demand, and returned the same, so endorsed, to the plaintiff as a receipt, showing upon its face the assessment, the demand for payment, the notice of penalty if not paid on or before the due date named therein, and the payment thereof before said date. A copy of said Notice and Demand for Tax and Receipt, with the endorsement thereon, is hereto annexed, and made a part hereof as "Exhibit H."

10. After consideration of said Claim for Refund, the Commissioner of Internal Revenue rejected the same and the defendant was instructed so to notify the plaintiff that said Claim was rejected. The defendant did so notify the plaintiff, in writing, on January

30th, 1918. A copy of said Notice of Rejection is hereto annexed and made a part hereof as "Exhibit I."

11. As will appear by said Notice of Rejection, the plaintiff's Claim for Refund was rejected by the Commissioner of Internal Revenue, inter alia, upon the Report of the Agents of the United States Revenue Department, which Report stated that said forgings had taken shape as a shell, and that a hole was made therein and the nose rounded by the claimant, leaving the machine work to be done by The Midvale Steel Company, and that the forgings were not marketable except for finishing as shells. The plaintiff avers  
9 and shows that said Report was contrary to the facts, and that the true facts were that none of said forgings, at the stage of development they had reached when they were sold and delivered by the plaintiff to The Midvale Steel Company, had taken shape as a shell, and that, although a hole was made in the forgings, the nose thereof was not rounded by the plaintiff. The said forgings, as developed by the plaintiff, had not only not taken shape as shells, but were in shape very different therefrom, being in a tubular form, with one end closed, and called for considerable machine work to be done thereupon before they were in condition to be regarded as the body of shells. They also required further forge treatment, including nosing in and shaping, before taking the shell form. The defendant further shows that, contrary to said Report of the Agents of the United States Revenue Department, the said forgings, as they left the plaintiff, were marketable otherwise than for finishing as shells.

12. The plaintiff further avers and shows that the said rough shell forgings manufactured and sold by the plaintiff, as it is advised, were merely raw material, in a certain partially advanced stage of development sold by the plaintiff to The Midvale Steel Company, capable of being developed, but only after further extensive forge treatment and machine treatment by the purchaser from the plaintiff, or by some person other than the plaintiff, into shell bodies, or bodies of a composition, structure and finish, adaptable, but only when completed and finished, for use as parts of shells; and that, as manufactured and sold by the plaintiff, they were not shells or parts of shells within the intendment of the statute.

13. The plaintiff avers and claims that the rough shell forgings constituting the product the net income from the manufacture and sale of which by the plaintiff was made the basis of the above tax, were neither any of the articles nor parts of any of the articles the net profits derived from the manufacture and sale of which were made taxable in and by said Section 301 of said Act of Congress of September 8th, 1916; and that the tax so as aforesaid assessed against it was illegally exacted of it.

14. The said tax so as aforesaid exacted of and paid by the plaintiff having been illegally assessed and demanded, the plaintiff brings this claim to recover the amount thereof, with interest. There is

justly due and owing by the defendant to the plaintiff \$74,857.07, with interest from July 25th, 1917.

(Sgd.)

A. H. WINTERSTEEN,  
*For Worth Brothers Company, Plaintiff.*

STATE OF PENNSYLVANIA,  
*County of Philadelphia, ss:*

D. Brewer Gehly, Treasurer of Worth Brothers Company, plaintiff in the above entitled cause, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Statement of Claim are true, and that there is justly due and owing the plaintiff by the defendant the sum of \$74,857.07, with interest from July 25th, 1917.

(Sgd.)

D. BREWER GEHLY.

Sworn and subscribed to before me this 5th day of October, 1918.

[SEAL.]

GRACE M. WOODRUFF,

*Notary Public.*

My commission expires May 8, 1921.

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## EXHIBIT A.

## Form No. 1089.

To be filled in by Internal Revenue Bureau.

Audited by \_\_\_\_\_.

To be filled in by Collector.

Collection District Assessment List Page —, Line —.

U. S. Internal Revenue.

Munitions Manufacturers' Tax.

## THE PENALTY

## IMPORTANT

Above space to be filled in by Collector, showing district and date filed.

for failure to have this Return in the hands of the Collector of Internal Revenue on or before March 1 is a fine of \$10,000 or imprisonment not exceeding one year, or both, and an additional assessment of 50 per cent. of the tax.

All information on this form should be read carefully before inserting figures.

*Return of Annual Net Profits.*

(Title III, Act of September 8, 1916.)

Return of Net Profits or Income for the Calendar Year Ended December 31, 1916.

By Worth Brothers Company, manufacturing .....  
(Article manufactured)  
and located at Widener Building, Philadelphia, Pennsylvania.

1. Total amount of capital employed in the business or properties used in the manufacture of munitions or parts thereof—
- 12      2. Total amount of debts or loans (interest-bearing) contracted to meet the needs of such business—
3. Gross amount of income received or accrued from the sale or disposition of munitions or parts thereof manufactured in the United States—
4. Cost of raw materials entering into the manufacture of such articles or parts—
5. Total amount of expenses of operation and maintenance relating to the business or properties—
6. Amount of interest paid within the year on debts or loans described in Item 2—
7. Taxes of all kinds paid within the year with respect to the business or properties relating to the manufacture of munitions or parts thereof—
8. Losses actually sustained and charged off within the year in connection with the business, and not compensated for by insurance or otherwise—
9. Depreciation on property used in, but not specially constructed or installed, in this business—
10. Amount apportioned to the year for amortization of the cost of buildings and machinery specially constructed or installed for use in manufacture of munitions or parts thereof—  
Total deductions, items 4 to 10, inclusive—
11. Total net profits upon which tax at 12½ per cent is computed—
12. Total amount of tax to be assessed—

Worth Brothers Company respectfully reports that, as advised to it by its counsel, during the tax year ended December 31st, 1916, it did not manufacture any of the articles or parts of the articles specified in Section 301 of the Act of Congress of

September 8, 1916, known as the Munitions Manufacturers' Tax Law, and that it is, therefore, not required to make any Return under said Act.

D. BREWER GEHLY,  
*Treasurer.*

**EXHIBIT B.**

May 31st, 1917.

Worth Brothers Company, Widener Building, Philadelphia, Pa.

GENTLEMEN:

Referring to your return of Annual Net Profits for the year ending December 31st, 1916, under the Munitions Manufacturers' Tax Law of September 8th, 1916, which return was filed February 28th, 1917, and showed as claimed by you, no products manufactured subject to the tax—I am instructed by the United States Commissioner of Internal Revenue to say:

1st. The Government claims that the rough shell forgings manufactured by you, are shells or parts of shells, and subject to the tax.

2nd. The Government, through me, as its Munitions Agent, requests you to file an amended return showing the facts and results in profits from your manufacture of such forgings.

Yours very truly,  
(Signed)

W. M. McCOY,  
*Munitions Agent.*

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**EXHIBIT C.**

Form No. 1089.

To be filled in by Internal Revenue Bureau.

Audited by \_\_\_\_\_. \_\_\_\_\_.

To be filled in by Collector.

Collection District Assessment List, Page —, Line —.

U. S. Internal Revenue.

Munitions Manufacturers' Tax.

**THE PENALTY**

**IMPORTANT**

Above space to be  
filled in by Collector,  
showing district and  
date filed.

for failure to have this  
Return in the hands of  
the Collector of Internal  
Revenue on or before  
March 1 is a fine of  
\$10,000 or imprisonment  
not exceeding one  
year, or both, and an  
additional assessment of  
50 per cent. of the tax.

All information on  
this form should be  
read carefully before  
inserting figures.

*Amended Return of Annual Net Profits.*

(Title III, Act of September 8, 1916.)

Amended Return of Net Profits or Income for the Calendar Year  
Ended December 31, 1916.

By Worth Brothers Company, Manufacturing Rough Shell Forgings and Located at Widener Building, Philadelphia, Pennsylvania.

1. Total amount of capital employed in the business or properties and used in the manufacture of munitions or parts thereof. Impossible to state.	
2. Total amount of debts or loans .	
15	
(interest-bearing) contracted to meet the needs of such business .....	\$3,050,000.00
3. Gross amount of income received or accrued from the sale or disposition of munitions or parts thereof manufactured in the United States .....	3,465,488.74
4. Manufacturing cost .....	\$2,233,406.22
5.	
6. Amount of interest paid within the year on debts or loans described in Item 2 .....	52,659.71
7. Taxes of all kinds paid within the year with respect to the business or properties relating to the manufacture of munitions or parts thereof .....	21,202.70
8. Losses actually sustained and charged off within the year in connection with the business, and not compensated for by insurance or otherwise .....	
9. Depreciation on property used in, but not specially constructed or installed, in this business ....	65,044.17

10.	Amount apportioned to the year for amortization of the cost of 16	
	buildings and machinery spe- cially constructed or installed for use in manufacture of mu- nitions or parts thereof .....	494,219.42
	Total deduction, Items 4 to 10, inclusive .....	2,866,632.22
11.	Total net profits upon which tax at 12½ per cent is computed..	598,856.52
12.	Total amount claimed by the government as assessable .....	74,857.07

We, E. E. Slick and D. Brewer Gehly, Vice President and Secretary & Treasurer, respectively, of Worth Brothers Company, whose return of net profits or income from the manufacture and sale or disposition of munitions or parts thereof is hereinbefore set out, being severally duly sworn, each for himself, depose and say that the facts and figures set out in the foregoing report or in any statement attached hereto, are, to his best knowledge and belief, true and correct in each and every item and particular.

E. E. SLICK,  
*Vice President,*  
D. BREWER GEHLY,  
*Secy. & Treas.*

Subscribed and sworn to before me this 31st day of May, 1917.

[SEAL.]

WM. S. EDGAR,  
*Notary Public.*

My commission expires February 19, 1921.

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#### EXHIBIT D.

##### *Protest of Worth Brothers Company.*

To the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Collector of Internal Revenue for the First District of Pennsylvania:

Dated May 31st, 1917.

SIRS:

Worth Brothers Company duly filed, as of February 28th, 1917, a Return of Annual Net Profits under the Act of Congress of September 8th, 1916, known as the Munition Manufacturers' Tax Law, showing, as it was then and is now advised, that it did not manufacture any of the articles or parts of the articles specified in Section 301 of said Act. It has now been requested by W. M. McCoy, Munitions Agent, under the instructions of the United States Commiss-

sioner of Internal Revenue, to file an Amended Return, upon a claim made by the government that the rough shell forgings manufactured by this Company are shells or parts of shells, and subject to the tax.

Pursuant to the above request, the company herewith presents for filing said Amended Return. In doing so, it respectfully protests against liability to make said Return, and against the claim that the rough shell forgings manufactured by the company are shells or parts of shells subject to the tax. It further makes protest that it is not the subject of any lawful demand for the payment of any taxes under the Munitions Manufacturers' Tax Law, for the year ended December 31st, 1916.

Respectfully submitted,

Name: WORTH BROTHERS COMPANY,

By D. BREWER GEHLY,

*Secretary & Treasurer.*

Address, Widener Building, Philadelphia.

#### EXHIBIT E.

##### *Protest of Worth Brothers Company.*

To the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Collector of Internal Revenue for the First District of Pennsylvania:

Dated July 24th, 1917.

SIRS:

Worth Brothers Company hereby tenders and transmits payment of \$74,857.07 pursuant and in response to the demand of the Collector of Internal Revenue under date of June 30th, 1917, for the payment on or before July 30th, 1917, of said amount, assessed against it as additional munitions manufacturers' taxes for the calendar year ended December 31st, 1916, under Section 301 of Title III of the Act of Congress of September 8th, 1916—said assessment being made upon the basis of said corporation's Amended Return as filed, under protest, May 31st, 1917. Said corporation now protests and claims as follows:

1. On or about February 28th, 1917, said corporation filed its Return, wherein it was stated, *inter alia*, as follows:

"Worth Brothers Company respectfully reports that, as advised to it by its counsel, during the tax year ended December 31st, 1916, it did not manufacture any of the articles or parts of the articles specified in section 301 of the Act of Congress of September 8th, 1916, known as the Munitions Manufacturers' Tax Law, and that it is, therefore, not required to make any Return under said Act."

2. In a writing dated May 31st, 1917, and signed by W. M. McCoy, Munitions Agent, on behalf of the United States government, it was claimed that the rough shell forgings manufactured by Worth Brothers Company during the calendar year 1916, were shells or parts of shells, and subject to the munitions

manufacturers' tax, and a request was made that the said company file an Amended Return, showing the facts and results in profits from the manufacture of such forgings. Pursuant to said request there was filed on May 31st, 1917, said Company's said Amended Return, wherein it was shown that the total net profits of said Company for the calendar year 1916, upon which a munitions manufacturers' tax was assessable against it, if the profits derived from rough shell forgings were subject to said tax, amounted to \$598,856.52, and that the tax assessable thereupon would be \$74,857.07. The said Company protests that said additional munitions manufacturers' tax of \$74,857.07 so as aforesaid assessed against it, was assessed contrary to law, and that it is not liable to the said tax, or to any part thereof.

3. The payment herewith made is made under strict protest and duress, and only because of said demand of the United States Government for payment thereof, and to avoid penalties threatened in the event of failure to pay at the time fixed by the government, and also to avoid distress upon or action against said corporation's property in the event of failure to comply with said demand. Notice is hereby given that a claim for refund of the whole amount of said tax so as aforesaid assessed and now paid, will be made, because the same has been illegally assessed and demanded.

4. Worth Brothers Company protests and claims specifically, as matter of fact and law, that the rough shell forgings manufactured by it—upon the basis of the profits derived from the manufacture of which during the calendar year 1916, the said tax (called additional tax) of \$74,857.07 was assessed against it—were not and are 20 not within any of the classes or descriptions of articles or parts of articles, the net profits derived from the sale or disposition of which were made taxable under Section 301 of Title III of the said Act of September 8th, 1916, which articles and parts of articles are as follows:

"(a) Gunpowder, and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells, or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) fire arms of any kind and appendages, including small arms, cannon, machine guns, rifles, and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e)."

Respectfully submitted,

WORTH BROTHERS COMPANY,  
By D. BREWER GEHLY,  
*Secretary & Treasurer,*  
*Widener Building, Philadelphia, Pa.*

A. H. WINTERSTEEN,

*Morris Building, 1421 Chestnut Street, Philadelphia, Pa.,*  
*Attorney for Claimant and Protestor.*

## EXHIBIT F.

Treasury Department,

Internal Revenue Service,

U. S. Post Office Building,

Philadelphia, Pa.

Office of the Collector, First District of Pennsylvania.

July 24, 1917.

A. H. Wintersteen, Esq., Morris Building, Philadelphia, Pa.

SIR:

I acknowledge receipt of certified cheques drawn to my order for \$275,142.19 and \$74,857.07, respectively, additional Munitions Manufacturers' Tax, assessed against the Midvale Steel Company and Worth Brothers Company, as of June 30, 1917.

I acknowledge also receipt of formal protest against the payment of these taxes, executed on behalf of the respective companies by the Secretary-Treasurer.

Formal receipts will be forwarded under separate cover—Form 1-17.

Respectfully yours,

EPHRAIM LEDERER.  
McE.,  
*Collector.*

McE-B.

## EXHIBIT G.

Worth Brothers Company.

Form 46—Revised Nov., 1907.

F. C. Apr. 5, '13.

Claim Under Series 7, No. 14, Revised, and Series 7, No. 27, Supplement No. 1, for Taxes Improperly Paid, or Refundable under Remedial Statutes and for Amounts Paid for Stamps Used in Error or Excess.

U. S. Internal Revenue.

STATE OF PENNSYLVANIA,  
*County of Philadelphia, ss:*

D. Brewer Gehly, of the Widener Bldg., of Philadelphia, and State and County aforesaid, being duly sworn according to law, deposes

and says, that he is Secretary and Treasurer of Worth Brothers Company; that it was engaged in the business of manufacturing rough shell forgings; that upon the thirtieth day of June, A. D. 1917, it was assessed an additional munitions manufacturers' tax of Seventy-four thousand, eight hundred fifty-seven and 07/100 dollars, on its net profits derived from rough shell forgings manufactured by it during the calendar year 1916, which amount it afterwards, on the 24th day of July, A. D. 1917, paid to Ephraim Lederer, Esq., Collector of Internal Revenue for the First District of Pennsylvania, and which amount, as this deponent verily believes, should be refunded for the following reasons, viz:

The said rough shell forgings were not within the classes or descriptions of articles or parts of articles the net profits derived from the sale or disposition of which were made taxable under Section 301 of Title III of the Act of Congress of September 8, 1916, which articles or parts of articles are as follows:

"(a) Gunpowder and other explosives excepting blasting powder and dynamite used for industrial purposes; (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells, or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles, and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e)."

And this deponent now claims on behalf of said Worth Brothers Company, that, by reason of the payment of the said sum of seventy-four thousand, eight hundred fifty-seven and 07/100 dollars, it is justly entitled to have the said sum of seventy-four thousand, eight hundred and fifty-seven & 07/100 dollars refunded, and it now asks and demands the same.

And this deponent further makes oath that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented for the refunding of the above amount, or any part thereof.

D. BREWER GEHLY.

Sworn to and subscribed before me this 25th day of July, A. D. 1917.

[SEAL.]

GRACE M. WOODRUFF,  
*Notary Public.*

My commission expires May 8, 1921.

24

## EXHIBIT H.

Form 1-17.

*Notice and Demand for Tax and Receipt—Regular Taxes.*

United States Internal Revenue.

Collector's Office	1st District	List 23
of Penna.	1917	May
	(year)	(Month)
		13 (Folio)
		12 (Line)

At Phila. Date June 30, 1917.

Notice is hereby given that there has been assessed against you the amount set opposite for the liability named which tax is payable to me. Demand is made for the payment of said tax on or before the date given below. Failure to do so will cause a 5 per cent penalty to accrue with interest at 1 per cent per month from due date until paid.

Add'l munitions etc.	
(Character of tax or liability)	
For period ended 1916.	
Taxes, penalties, etc.	
Amount of Tax..	\$74,857.07
50 per cent pen-	
alty .....	
100 per cent pen-	
alty .....	
5 per cent penalty .....	
Total .....	<u>\$74,857.07</u>

Due date 7/30/17.

EPHRAIM LEDERER,  
Collector Internal Revenue.

Worth Brothers Co., Phila., Pa.

Received Payment, July 25, 1917.

EPHRAIM LEDERER,  
Collector of Internal Revenue.

This notice with attached copies must be presented at the time payment is tendered, as when properly stamped "paid" by the Collector it becomes a receipt for taxes.

25

(Endorsed.)

I certify that on 7/31/17 there was filed by Worth Bros. Co. a claim for refunding \$74,857.07 tax for which this receipt was issued.

ELLIS LEWIS,  
Deputy Collector.

## EXHIBIT I.

Treasury Department.

Internal Revenue Service.

U. S. Post Office Bldg., Philadelphia, Pa.

Office of the Collector, First District of Pennsylvania.

January 30, 1918.

Midvale Steel Company, Widener Building, Philadelphia, Pa.

SIRS:

This office is in receipt of a letter from the Commissioner of Internal Revenue under date of January 21, 1918, in which we are instructed to advise you that your claim and that of the Worth Brothers Manufacturing Company, both of Philadelphia, for the refund of \$275,142.19 and \$74,857.07,—additional munitions manufacturers' tax for 1916, have been examined and rejected. The Commissioner of Internal Revenue states:

"No evidence is submitted by claimants in support of their contention that the rough forgings are not properly within the purview of Sec. 301 of the Act. The Revenue Agents, however, stated that

in the case of Midvale Steel Company that the gun forgings  
26 had taken shape as parts of a gun, and while they were assembled and machined in England, they could not be used for any other purpose than that for which they were intended, and are unquestionably taxable as munitions parts; that the shell forgings had taken shape as a shell, being rounded and having a hole made in them, and while the necessary machining and loading was done in England, they could not have been used for any purpose other than a shell.

"The Agent's report in the case of the Worth Brothers Company states that the forgings had taken shape as a shell and a hole was made therein and the nose rounded by the claimant, leaving the machine work to be done by the Midvale Steel Company, and that the forgings were not marketable except for finishing as shells.

"It appears from the evidence submitted that the forgings were relatively complete within themselves and designed and manufactured for the special purpose of being used as a component part of a completed munition.

"Therefore, since the law assesses the tax on the profits arising from the sale or disposition of munitions or parts thereof, and no distinction is made between the manufacture of the finished and unfinished product, this office concurs in the findings of the revenue agents, and the claims are accordingly rejected."

Respectfully yours,

E. LEDERER,  
*Collector.*

Ls.:B.

2-525

*Affidavit of Defense.*

(Filed Oct. 16, 1918.)

Ephraim Lederer, Collector of Internal Revenue, from the first district of Pennsylvania, the defendant, has a just and true defense to the whole of the plaintiff's claim as follows:

27        1. Admitted.

2. Admitted.

3. The defendant is informed and believes that the plaintiff did manufacture articles and parts of articles specified in Section 301 of the Act of September 8, 1916.

4. The defendant admits that the plaintiff was required to file an amended return as set forth in paragraph 4 of the plaintiff's statement, but has no knowledge of the other facts therein stated and calls for proof of the same.

5. It is admitted that "Exhibit C" and "Exhibit D" were filed.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. The defendant denies all the averments of facts in paragraph 11 of the plaintiff's statement because he is informed and believes, and therefore avers that the products which are the subject-matter of this suit had reached a stage of development in the manufactory of the defendant which made the defendant liable of the said tax.

12. The defendant denies that averments of the facts for the reason set forth in paragraph 11.

28        13. The defendant denies the averments of the facts set forth in paragraph 13 for the reason set forth in paragraph 11.

14. Wherefore the defendant denies that he is indebted to the plaintiff in the sum of \$74,857.07 with interest from July 25, 1917.

(Sgd.)

E. LEDERER.

Affirmed and subscribed to this 16th day of October, A. D. 1918, before me.

LEO A. LILLY,

*Deputy Clerk District Court United States,  
Eastern District of Pennsylvania.*

*Stipulation Waiving a Jury.*

(Filed Nov. 22, 1918.)

It is stipulated and agreed between the plaintiff and the defendant that a trial by a jury be and it is hereby waived, and that the issues of fact involved in the cause shall be tried and determined by the Court, without the intervention of a jury.

(Sgd.)

A. H. WINTERSTEEN,

*Attorney for Plaintiff.*

(Sgd.)

R. J. STERRETT,

*Attorney for Defendant.*

Nov. 21, 1918.

*Bill of Exceptions.* \*

(Filed Apr. 3, 1919.)

Be it remembered, that at the above number and term, came into this Court, Worth Brothers Company, a corporation organized 29 and existing under the laws of the State of Pennsylvania, plaintiff, and filed its statement of claim against Ephraim Lederer, Collector of Internal Revenue, on the seventh day of October, 1918 (see statement of claim), and the said defendant filed its affidavit of defense to said statement of claim on the sixteenth day of October, 1918 (see affidavit of defense), and thereupon issue was duly joined and thereafter, to wit, at a session of this court held on the twenty-ninth and thirtieth days of January, 1919, the said issue came on to be tried before the Honorable J. Whitaker Thompson, District Judge, without a jury (see stipulation waiving trial by jury), at which time appeared the plaintiff and defendant, with their respective attorneys, whereupon the witnesses whose names are set forth in the testimony, which testimony is made part of this bill of exceptions (see testimony) were called and duly sworn and testified as in said testimony set forth, and on the twenty-eighth day — February, 1919, the plaintiff filed a request for findings of fact and conclusions of law (see request for findings of fact and conclusions of law), and on the twenty-eighth day of February, 1919, the Court filed its opinion, including therein its conclusions of fact and law, in favor of defendant (see opinion of Court) and in said opinion directed that judgment be entered in favor of defendant and against the plaintiff, and pursuant thereto, on the eleventh day of March, 1919, the Court entered judgment in favor of defendant and against the plaintiff (see judgment), and on the twenty-sixth day of March, 1919, the plaintiff excepted to the said order of Court (see exceptions), which exceptions were, upon said date, duly noted and bill sealed.

Whereupon, on the third day of April, 1919, the plaintiff filed its petition for a writ of error and presented said petition, with its assignments of error, and upon the said day said writ was duly al-

30 lowed and issued and the citation was thereupon issued and served upon counsel for the defendant, and thereupon the aforesaid Judge did to this bill of exceptions, in pursuance of the request of the plaintiff in error and of the law put his seal this third day of April, 1919.

J. W. THOMPSON, [SEAL.]

*Judge for the United States District Court  
for the Eastern District of Pennsylvania.*

The foregoing bill of exceptions presented to me and found correct  
FRANCIS FISHER KANE,  
*Attorney for Defendant.*

31 In the District Court of the United States for the Eastern District of Pennsylvania, September Sessions, 1918.

No. 5738.

WORTH BROTHERS COMPANY, a Corporation of the State of Pennsylvania, and a Citizen Thereof,

v.

EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania.

Philadelphia, Pa., Wednesday, January 29, 1919.

Before Hon. J. Whitaker Thompson, J.

Present:

Joseph D. McCoy, Esq., and  
A. H. Wintersteen, Esq., representing the plaintiff.  
Robert J. Sterrett, Esq., Assistant United States District Attorney,  
Francis Fisher Kane, Esq., United States District Attorney  
and  
William L. Frierson, Esq., Assistant United States Attorney  
General, representing the defendant.

Transcript of Testimony, Rulings of the Court and Exceptions.

*Plaintiff's Evidence.*

Mr. Wintersteen: I offer in evidence the stipulation of agreement upon facts, which reads as follows:

32 "Stipulation of Agreed Upon Facts.

And Now, to wit: January 27, 1918, the following facts are agreed upon between the parties to the cause. Either party is liable to prove

any additional or supplemental facts deemed material, not inconsistent with the statements herein contained.

1. The plaintiff is a corporation of the State of Pennsylvania, incorporated pursuant to Letters Patent issued January 3, 1896, under the provisions of the General Corporation Law of Pennsylvania, approved April 29, 1874, and the supplements thereto. The purpose for which the corporation was formed, according to the terms of its charter, is the manufacture of iron or steel or both, or any other metal, and of any article of commerce from metal or wood or both. Its principal office and place of business at the time of the imposition of the tax in this cause involved, was and now is Widener Building, Philadelphia, State of Pennsylvania, Eastern District thereof, and the plant at which were manufactured the products the income derived from which is the subject of said tax claim, is located at Coatesville, Chester County, Pennsylvania, in said district. The plaintiff is a citizen and resident of the State of Pennsylvania and one of the said district thereof.

2. The defendant is a citizen of the State of Pennsylvania and a resident of the City of Philadelphia, in the Eastern District of the State of Pennsylvania, and at all times hereinafter mentioned was and is the Collector of United States Internal Revenue for the First District of Pennsylvania. The said Internal Revenue District comprises within its boundaries the places where the plaintiff's principal office and manufactory hereinbefore mentioned are located.

3. Under the provisions of Title III of the Act of Congress approved September 8th, 1916, entitled, 'An Act to increase the revenue and for other purposes,' an excise tax was imposed upon certain classes of persons, including corporations. The section of the said Title imposing said tax is as follows:

'Sec. 301. (1) That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles and bayonets; (e) electric motorboats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d) or (e), shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States; Provided, however, That no person shall pay such tax upon net profits received during the year nineteen hundred and sixteen derived from the sale and delivery of the articles enumerated in this section under contracts executed and fully performed by such person prior to January first, nineteen hundred and sixteen.'

4. On or about October 24, 1916, the Treasury Department of the United States issued and promulgated, for the information of Internal Revenue Officers and others concerned, a Treasury decision, known as Treasury Decision No. 2384 designated 'Regulations concerning the tax imposed by Title III of an Act approved September 8, 1916, entitled "An Act to increase the revenue, and for other purposes." Articles XIII and XV of said Treasury Decision are as follows:

34      'Art. XIII. "Any part thereof" as used in Section 301 of this Title is any article, relatively complete within itself, and designed or manufactured for the special purpose of being used as a component part of a completed munition, and which, by reason of some peculiar characteristic, loses its identity as a commercial commodity, and which, without further treatment, cannot be used for any purpose other than that for which it was designed.

A stock or commercial commodity purchasable in the general trade or open market, if adapted to use in the manufacture of a munition is not a "part" within the meaning of this Section, and will be treated as raw material (see Article XI, 1066), provided that articles which ordinarily would be classed as commercial commodities become "parts" within the meaning of this Title when they are manufactured specially for, and sold to a manufacturer to be, by him, incorporated in and made an essential part of any munitions enumerated in Section 301 of this Title.

Art. XV. As used in Section 302 of this Title, and as applied to the manufacture of any part thereof (referring to the articles enumerated in paragraphs (b) to (e) inclusive, of Section 301), raw materials are held to be any crude or elemental products or substances necessary to the manufacture of such parts, and which, without the application of skill or science cannot become component parts or elements in the finished article or unit.

As applied to the manufacture of completed munitions, raw materials will include not only such crude products and elemental substances, but all essential finished or unfinished parts as well. The cost of raw materials authorized as a deduction will not include any expenditures made for raw materials used in the manufacture of articles, other than munitions or parts thereof in cases wherein the manufacture of such munitions or parts is carried on in connection

with any other business. In other words, the only deduction  
35      to be made from the gross income contemplated by this Title  
on account of the cost of raw materials, is the cost of such materials as are actually used in the manufacture of the articles, the profit on the sale or disposition of which is subject to the tax imposed by this title.'

5. [During the taxable year 1916 the plaintiff made the steel for and did the forging on certain shell bodies under an order from the Midvale Steel Company, to enable the latter Company to carry out a contract which it had with the government of France for certain explosive shells. The steel was made and the forging done by the

plaintiff in accordance with specifications required by the French Government, which specifications were attached to the order from the Midvale Steel Company to the plaintiff.]\*

Copies of the contract between the French Government and the Midvale Steel Company and the specifications accompanying the contracts are hereto attached and marked respectively Exhibits J and K.

Inspectors employed by the French Government inspected the work done by the plaintiff, testing the steel and examining the forgings as they passed through the plaintiff's hands. Up to the time when the blooms of steel were sliced partly through into billets, the right of inspection was exercised by the French Inspector-in-Chief, only whenever he desired to exercise it. From the time that the blooms were so partly sliced through into billets, an inspection was made of every forging by the French Inspector or his assistants. Certain forgings were rejected, and those that were passed were so marked by the French Inspector. This was done in accordance with an understanding between the plaintiff and the Midvale Steel Company.

The profits upon which the tax claimed in this case was imposed were derived solely from the sale of the above-mentioned 36 forgings by the plaintiff to the Midvale Steel Company, and required by the latter in order that it might carry out its said contract with the government of France.

6. The shell forgings that were [thus]\* manufactured and delivered by the plaintiff to the Midvale Steel Company were for four different sizes of shells; and as they left the plant of the plaintiff they were of the following approximate dimensions and weights:

	Outside diameter.	Inside diameter.	Approx. length.	Approx. weight.
For 220 mm shells	9 3-8 in.	7 in.	32 3-4 in.	351 lbs.
" 270 " "	11 9-16 "	8 31-32 in.	40 "	504 "
" 280 " "	11 7-8 "	9 31-64 "	46 "	669 "
" 293 " "	12 15-32 "	10 "	44 "	735 "

The shell bodies after the fabrication of them had been completed, and the copper band attached, by the Midvale Steel Company, were of the approximate dimensions and weight:

	Outside diameter.	Inside diameter.	Approx. length.	Approx. weight.
For 220 mm shells	8.60 in.	7.36 in.	29.53 in.	160 lbs.
" 270 " "	10.57 "	9.25 "	30.71 "	242 "
" 280 " "	10.97 "	9.80 "	41.69 "	303 "
" 293 " "	11.47 "	10.32 "	39.15 "	344 "

[\*Words and figures enclosed in brackets erased in copy.]

7. Measured in dollars the plaintiff did about 40% and the Midvale Steel Company about 60% of the work on [the articles]\* supplied to the French Government contracted for with said Government by the Midvale Steel Company, as aforesaid.

8. The plaintiff, on February 28, 1917, made a Report or Return to the Commissioner of Internal Revenue, stating that it was advised by its counsel that during the taxable year 1916 it did not manufacture any of the articles or parts of the articles specified in Section 301 of the Act of Congress of September 8th, 1916, and that it was, therefore, not required to make any return under the section of said Act which imposed the duty of making return upon those persons who manufactured the articles the profits derived from which were made taxable by Section 301. Subsequently, the revenue agent of the United States Government made written claim of the plaintiff that the rough shell forgings manufactured by it during the taxable year 1916, were shells or parts of shells, and, as such, subject to the munition manufacturers' tax, and demanded that plaintiff file an Amended Return. Plaintiff thereupon, in obedience to said claim and demand, filed, under protest, an Amended Return, showing the net profits derived from its manufacture of rough shell forgings during said year (being the rough shell forgings sold and delivered to The Midvale Steel Company as above mentioned) as amounting to \$598,856.52. Upon said net profits the defendant subsequently levied and assessed a munition manufacturers' tax of 12½ per cent, amounting to \$74,857.07.

9. The defendant demanded payment of said tax on or before July 30th, 1917, with notice that a penalty of 5 per cent. would accrue, with interest at 1 per cent. per month, if the said tax was not paid by said date, and threatened to enforce said payment, together with the penalties and interest as provided in the Act, by distraint and sale of the plaintiff's property. Thereupon the plaintiff, solely to avoid the imposition of the penalties and interest and the threatened distraint and sale, and under compulsion, duress, coercion and protest, paid to the defendant, as Collector of United States Internal Revenue, on July 25th, 1917, the amount of said tax so as aforesaid levied and assessed, \$74,857.07. Plaintiff at the same time filed with the defendant its written protest, wherein it was stated that said payment was made under strict protest and duress, and only because of the demand of the United States Government for the payment thereof, and to avoid the penalties threatened in the event of failure to pay within the time fixed by the Government, and also to avoid distress upon the plaintiff's property, in the event of failure to comply with said demand. Notice was also thereupon given defendant that a claim for refund of the whole amount of said tax so as aforesaid assessed and paid, would be made, because the same was illegally assessed and demanded.

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[\*Words and figures enclosed in brackets erased in copy.]

10. Subsequently, on July 27th, 1917, the plaintiff filed with the defendant, for presentation to the Commissioner of Internal Revenue, a Claim for Refund of the amount so as aforesaid assessed and paid. After consideration of said Claim for Refund, the Commissioner of Internal Revenue rejected the same, and the defendant was instructed by him to notify the plaintiff that the said Claim was rejected. The defendant did so notify the plaintiff on January 30, 1918. No part of said sum of \$74,857.07 has been repaid to the plaintiff.

11. True and correct copies of the plaintiff's Report or Return of Annual Net Profits as originally filed February 28, 1917; of the Claim of the Revenue Agent of the United States and Demand for an Amended Return; of the plaintiff's Amended Return; of the plaintiff's Protest accompanying said Amended Return; of the plaintiff's Protest accompanying the payment of the tax as assessed; of the defendant's Acknowledgment of Receipt of the tax assessed and of the plaintiff's Protest accompanying the same; of the plaintiff's Claim for Refund made to the Commissioner of Internal Revenue; of the defendant's Notice and Demand for the payment of the tax, and of the defendant's receipt therefor and of his certificate of the filing of the Claim for Refund; and of the Claim for Refund by the

Commissioner of Internal Revenue, are annexed to the plaintiff's Statement of Claim in this cause, marked respectively Exhibits 'A,' 'B,' 'C,' 'D,' 'E,' 'F,' 'G,' 'H' and 'I,' and are to be considered as part of this stipulation."

A. H. WINTERSTEEN,  
*Attorney for Plaintiff.*  
ROBERT J. STERRETT,  
*Assistant United States Attorney.*

Philadelphia, January 28, 1919.

R. H. STEVENS, having been duly sworn, was examined and testified as follows:

By Mr. Wintersteen:

Q. What is your full name?  
A. R. H. Stevens.

Mr. Wintersteen: I am calling Mr. Stevens, not for any other purpose than to inform the Court generally of the scope of the operations of the plant of the Worth Brothers Company at Coatesville. I will have other witnesses to show in detail the work that was done upon this particular material.

By Mr. Wintersteen:

Q. What is your full name?  
A. Richard Harry Stevens.  
Q. What is your age?  
A. Forty-six.

Q. What is your business?

A. Chief Engineer of the Midvale Steel & Ordnance Company.

Q. What was your business in 1916?

A. In the beginning of the year I was Chief Engineer for Wolf Brothers Company.

Q. Where?

A. At Coatesville.

40 Q. And what were your duties there?

A. In an engineering capacity, building the plant. That is, the beginning part of the year.

Q. And you were there all the time, I suppose?

A. I was there, yes, a large percentage of the time.

Q. Will you give to the court information as to what Worth Brothers Company's plant is at Coatesville, what it consists of, and what its products were in 1916?

A. It consisted of a blast furnace, and open hearth plant, plate mills, and in the latter part of 1916 they had a blooming mill, and they also made forge blooms and bars, skelp, and tubes.

Q. So that the court may know, give in detail, in a general way, all the classes of material that they turned out as products?

A. Well, there was pig iron, steel ingots, plates for all purposes.

Q. Blooms?

A. Blooms.

Q. Steel blooms and forge blooms?

A. Steel blooms, forge blooms, bars, skelp, tubes, and shell forgings.

Q. What is skelp?

A. It is a plate that they form into a tube.

Q. And what was the substantial work, in respect to quantity, the main work, if there was any main work, or main class of work done?

A. The main class of work was plates.

Q. For what?

A. That is, a finished product.

Q. For what use commercially?

A. For ship plates, furnace boilers.

Q. What portion of the work at the Worth Brothers Plant was directed during that year to shell forgings, or forgings for shells? Was it the substantive part, or was it an incidental part?

A. It was a small part of the total production.

41 Q. I show you a paper. I have asked you to prepare a comparative statement of the production in tons of the various products of Worth Brothers Company in 1915 and 1916. Have you prepared such a paper, or caused it to be prepared?

A. It has been prepared.

Q. Does that represent the facts as to the production during those years of the company in those various lines?

A. That is taken from our records and would be substantially correct.

Mr. Wintersteen: I offer in evidence paper entitled "Worth Brothers Company, comparative statement of production in gross

tons, products, 1915 and 1916," and ask that it be marked "Plaintiff's Exhibit No. 1."

(The paper is marked "Plaintiff's Exhibit No. 1, T. R. P." and reads as follows:

**"PLAINTIFF'S EXHIBIT NO. 1, T. R. P.**

12-30-18.  
Worth Brothers Company.

*Comparative Statement of Production in Gross Tons.*

Products.	1915.	1916.
Pig Iron .....	152,991	254,923
Steel Ingots .....	313,094	404,496
Steel Blooms .....	_____	25,490
Forge Blooms .....	8,048	22,333
Bars .....	11,240	26,916
Skelp .....	10,326	16,143
Boiler Tubes .....	8,224	13,515
Steel Plates & Flanged Products .....	221,598	242,347
Shell forgings .....	_____	19,109
	Shipped	18,773

Copy to

A. H. Wintersteen,  
R. H. Stevens,  
B. A. Blume.")

42 Cross-examined.

By Mr. Frierson:

Q. Worth Brothers had never made any shell forgings until 1916, had they?

A. No, not to my knowledge.

Q. And they have not since made any except those that they made under contract with or order from the Midvale Steel Company, have they?

A. I believe that all the shells that were made—you mean to confine it to those two years, or subsequently?

Q. Well, during 1916, first?

A. I think that all the product was on order from the Midvale Steel Company.

Q. And that was an order to make according to specifications from the French Government, which were furnished at the time?

A. Yes, sir.

Q. And those specifications covered the manufacture of the steel itself, and then the making of the forgings?

A. They required certain physical and chemical analyses—physi-

cal or chemical. I did not see the specifications. I could not answer which.

Q. There were specifications?

A. Undoubtedly, yes, sir, there were specifications.

Q. And the process, beginning with the manufacture of the steel itself, and up to the time Worth Brothers turned the product over to the Midvale Company,—every stage of the process was under the inspection of the French inspectors, was it not?

A. Well, I believe they had some French inspectors in the open hearth department, just following up, to check up the heats that went into the shell forgings. I do not know that they assumed any responsibility of that until it was a finished bloom or forging.

43 Q. And from that time on it was under their constant inspection?

A. Yes.

Q. The Worth Brothers Plant at the time it received this order or contract from the Midvale Company was not equipped to make shell forgings, was it?

A. No, not installed, although prior to any order there was some machinery on order.

Q. That had been ordered in anticipation of their work from the Midvale Company?

A. Yes, for the shell work.

Q. For the shell work?

A. Yes, sir.

Q. And in order to equip it for the shell work, a very large amount of machinery was acquired, was it not?

A. Yes, quite a lot of machinery.

Q. Something near a half million dollars' worth?

A. Yes, or more.

Q. What, if you know, is the relationship between Worth Brothers and the Midvale Steel Company?

A. I do not know that there was any relation at that time except probably through a holding company.

Q. And that holding company was the Midvale Steel & Ordnance Company, was it not?

A. The Midvale Steel & Ordnance Company, yes.

Q. And that company owned and controlled both Worth Brothers and the Midvale Steel Company?

A. To the best of my knowledge, they did.

D. BREWER GEHLY, having been duly sworn, was examined and testified as follows:

By Mr. Wintersteen:

Q. What is your full name?

A. D. Brewer Gehly.

44 Mr. Wintersteen: This witness also is offered merely for the purpose of general information. Not with reference to any technical development of this material.

By Mr. Wintersteen:

Q. You are the secretary and treasurer of Worth Brothers Company, are you?

A. I am, yes, sir.

Q. And Worth Brothers Company, I presume, made its return for taxation under this Munitions Tax Act for the year 1916?

A. It did; yes, sir.

Q. According to the records, that return was made in June, 1917, I believe?

A. Yes, sir.

Q. It has already been testified that Worth Brothers manufactured forgings or shell forgings in 1916?

A. Yes, sir.

Q. And in return to the Government it was so stated and I believe the records show that they paid a tax thereupon?

A. Yes, sir.

Q. What did they do with those forgings when completed?

A. They were sold to Midvale.

Q. To the Midvale Steel Company?

A. Yes, sir.

Q. The statement made in the Plaintiff's statement of claim that this material was manufactured by the Worth Brothers Company,—the material involved in this suit,—and sold by them to the Midvale Steel Company, is correct. Is that correct?

A. Yes, sir.

45 Cross-examined.

By Mr. Frierson:

Q. When you say it was sold to the Midvale Steel Company, you mean that your company accepted an order to manufacture according to the French specifications, and turned it over to the Midvale Steel Company?

Mr. Wintersteen: He did not mean anything of the sort.

Mr. Frierson: I am asking him.

The Witness: We manufactured it on order. As to the French specifications, I am not in a position to say, but I imagine it was.

By Mr. Frierson:

Q. Under specifications furnished you by the Midvale Steel Company?

A. Yes, sir.

Q. And this was not a product that you had been manufacturing and keeping in stock at all?

A. No. It was made on order.

Q. And, so far as you know, it was not a product that was kept in stock for sale anywhere, was it?

A. No, sir.

Q. It had to be manufactured according to certain sizes?

A. Yes.

Q. And all that your company did was to manufacture such as were ordered by the Midvale Steel Company,

A. Yes, sir.

Q. Are you familiar with the processes through which the manufacture of a shell goes?

A. I am not.

46 Redirect examination.

By Mr. Wintersteen:

Q. The assistant attorney general having gone into the fact, it gives me the opportunity of exhausting more fully your degree of knowledge, and I hope to be able to do so. He asked whether this material was not fabricated upon special orders, and pursuant to specifications. Is it not a fact that, with reference to practically all of the products of the Worth Brothers Company, under modern conditions, they are made pursuant to order, and upon specifications?

A. Yes, sir.

Q. Is there any very wide area of what is called stock material in any industrial plant in this country excepting pig iron and the elementary forms of iron and steel fabrication?

A. There are none.

Q. Therefore, the fact that this material was made upon order, pursuant to specifications, was of no consequence as differentiating it at all from any other product for other purposes, was it?

A. That is correct, yes, sir.

Recross-examination.

By Mr. Frierson:

Q. In other words, you mean that Worth Brothers Company is a manufacturer, and not a dealer?

A. Yes, sir.

D. W. O'LEARY, having been duly sworn, was examined and testified as follows:

By Mr. Wintersteen:

Q. What is your business?

A. Superintendent of the Special Forging Department at Worth Brothers.

47 Q. At Coatesville?

A. Coatesville Works.

Q. And what was your business and your relationship to the enterprise in 1916?

A. Foreman of the Special Forge Department.

Q. Foreman of the Special Forge Department?

A. Foreman of the Special Forge Department, yes, sir. Foreman of the shop.

Q. And what were your duties as foreman?

A. Supervision of the forging, from the block to the shell forging.

Q. I fancy that you know something about the manufacture of steel?

A. Something, yes, sir.

Q. The development of steel?

A. Yes.

Q. What has been your experience?

A. Well, my experience has been twenty years in the steel industry.

Q. Where did you start?

A. Homestead Steel Works.

Q. What job did you have?

A. I first started in the office as a messenger boy. Afterward worked as a clerk, in the order department, and have worked as a recorder through the mill. Eventually foreman of the mill.

Q. Then you sort of grew up with the business, didn't you?

A. Grew up from a boy, 15 years old.

Q. How old are you now?

A. 35.

Q. Do you recollect the fabrication of shell forgings or black forgings, or black shell forgings, which ever you call the material, by the Worth Brothers Company?

A. I do.

Q. In 1916?

48

A. Yes.

Q. And which were subsequently, when developed into black forgings, sold to the Midvale Steel Company?

A. Yes.

Q. Will you state, so that the court can understand and we can understand, the development of the material from the point at which you took it until it reached the point at which it was ready for delivery and was delivered to the Midvale Steel Company?

A. At that time, under my jurisdiction, we took the block, as you see it there, the cylindrical block, heated it in the furnace, about two or three hours' time, pierced it under a hydraulic piercing press, into the second form, as you see it there.

Q. Before we come to that, let us get a little earlier or a little farther back into the schedule of production. Where did you take the material? From what stage did you take the material?

A. You mean where did Worth Brothers take the material?

Q. Yes. Where did you start?

A. Started at the blast furnace.

Q. What is the material that goes in the blast furnace made of?

A. 50% of ore, about 30% of coke and probably 20% of limestone.

Q. Therefore, did you buy the ore?

A. We bought the ore, yes, sir, as far as I know.

Q. Let us start there. We start in the fabrication of any material made of steel with ore, do we not?

A. Yes, sir.

Q. Therefore, the first stage, I suppose, of your development was the use of the ore and the other ingredients, including, I suppose, limestone, and what else?

A. Coke.

49 Q. Coke?

A. Yes.

Q. And what did you do with that?

A. Placed it in the furnace.

Q. And developed it into what?

A. Smelted it down into iron, pig iron, in the form of either pig iron or hard metal.

Q. Therefore, that was the first stage of your process of the development of the raw material. Is that so?

A. Yes.

Q. Putting it into the blast furnace, and developing it into pig iron, and then what did you do after that?

A. After melting it into pig iron in most cases it was taken to the open hearth in the form of hot metal.

Q. That is another alternative form of pig iron?

A. Yes. It is pig iron, not cast.

Q. It is an alternative of pig iron. It is practically the pig iron stage. In order to save expense, I suppose you just transferred it with a ladle, or a carriage, into the furnace. Is that right?

A. Carried it in a ladle, yes, sir.

Q. After that was reached, you put it into an open hearth furnace, you say?

A. Either put it in an open hearth furnace or in a metal mixer, which is a container. Afterward poured into the open hearth furnace.

Q. To what stage does the manufacture in the open hearth furnace develop the material? What do you call it? What do you call the material that comes out of the open hearth furnace?

A. Steel.

Q. Steel?

A. Yes.

Q. Then, that is the second stage?

A. Yes, sir.

50 Q. What was done with the material when it came out of the open hearth furnace?

A. When it came out?

Q. Yes.

A. It is tapped out of the open hearth furnace into a ladle, which is a container. It is taken from the ladle and poured into individual moulds, in the form of ingots. After cooling, the ingots are stripped, placed on trucks and delivered to the blooming mill.

Q. Then, as I understand it, the cooling of this material, in the molten state, coming from the open hearth furnace, makes ingots. Is that right?

A. The ingot mold forms the ingot. The cooling is done so that it will have sufficient skin on it to hold the steel in the form of an ingot.

Q. But the ingot is the product of the open hearth furnace?

A. The ingot is the product of the open hearth furnace.

Q. That is the third step?

A. Yes, sir.

Q. What, after the ingot stage, is the development of the material?

A. It is taken to the blooming mill and charged into soaking beds, which are heating beds.

Q. What is a soaking bed?

A. A soaking bed is an underground bed used for either heating or maintaining the heat of anything in it.

Q. What is the purpose of the soaking bed? What is the change in the material that is produced while in the soaking bed?

A. No change whatever other than heating the steel to the proper temperature for rolling.

Q. Then, that would not be a finished step?

A. It would be an advanced step.

51 Q. It would be more or less an advancing step. Is that right?

A. Yes, sir.

Q. You have got the material from the ore into the pig iron, or hot metal. Then you have got it into the open hearth, and you have got it out of the open hearth in the form of ingots. What is the next step after the ingot stage?

A. The ingot is then heated and rolled, which is done in the blooming mill, into rounds.

Q. Rounds?

A. Yes, sir.

Q. Is a round the same thing as a billet?

A. No, a round is what we call a bloom

Q. A bloom?

A. Yes.

Q. What is the difference between an ingot and a bloom?

A. A bloom is a large billet. A combination of billets.

Q. Then, we have the ingot developed into a bloom. Is that right?

A. That is right.

Q. What do you do after the bloom stage?

A. After rolled into a round, the bloom would be cut into multiples of four to six billets with a hot saw—into multiples of four to six billets.

Q. So that the difference between a billet and a round or bloom is that one is a sub-division of the other. Is that right?

A. Yes. In shell forgings a billet is termed a single unit, where a bloom is a combination, or multiples of those billets.

Q. After the billet stage, what is done with the billet? I am speaking now of the development of this material, in the production

of it, up to the final form it took when it was delivered to the  
52 Midvale Steel Company. After the billet stage what was  
done?

A. It was still in the bloom stage. It was cut into multiples of  
billets, in the bloom stage, taken to the slicing department, and cut  
part way through into billets of sufficient length and width for the  
shell forging required.

Q. Depending upon the size of the shell forging?

A. Yes, sir.

Q. Expected?

A. Yes, sir.

Q. What was the object of cutting it part way through?

A. The French Commission required you to show a fracture base  
in each billet. It was cut part way through with a slicing machine  
then taken to a hydraulic bulldozer and crushed or fractured, which  
showed a clean fracture on each billet.

Q. Then what is the next stage?

A. At this point the French inspectors inspected each individual  
billet for piping. Any billet that shows any indication of piping is  
thrown out.

Q. What is piping? Blow holes?

A. Blow holes or defects in the steel.

Q. Then, after it is partly sliced through, after the material is  
partly cut through, what is the next step?

A. The accepted billets are chipped for surface defects.

Q. Chipped for surface defects?

A. Any minor surface defects.

Q. What is done then?

A. From there it is taken to the forge shop for heating, placed in  
a continuous furnace, heated two or three hours, according to the  
operation of the shop, and then taken out or withdrawn from the  
furnace and pierced in a hydraulic piercing press.

53 Q. You say "Pierced." You mean a hole made in the  
material?

A. A hole made in it similar to the Exhibit No. 2 there.

Q. Similar to this Exhibit marked No. 2. Is that right?

A. To the one next to the block.

Q. How far is the hole pushed through? All the way through?

A. No, the hole is pierced down leaving a base.

Q. After the piercing process takes place, what is done with the  
material?

A. The forging is then taken to a horizontal hydraulic draw  
bench, reduced in diameter and increased in length to the size as  
shown in the 5th Exhibit there.

Q. Then as a matter of fact, the stage of development, the development  
that takes place between what is the second Exhibit here and  
the fifth is merely the lengthening out of the material. Is that  
right?

A. Lengthening out, reducing the outside diameter and the in-  
side diameter.

Q. Reducing. Boring it out?

A. Yes, sir.

Q. Is that the last stage?

A. That is the last stage at the Worth Brothers Company.

Q. Nothing is further done beyond that?

A. Nothing further except placed in pits for slow cooling and annealing.

Q. Slow. Of course, you could not handle it unless it were cooled?

A. No, sir.

Q. What do you call in the trade the material which I designate as No. 1 here?

A. We would call that a billet.

Q. A billet?

A. Yes, sir.

54 Q. This round bloom or billet?

A. That is termed a billet.

Q. What is the technical name of the next one?

A. A forging.

Q. A forging?

A. Yes, sir.

Q. What is the technical name of the next one?

A. We call that a drawn forging.

Q. A drawn forging?

A. Yes, sir. The other is pierced.

Q. Billet forging and drawn forging?

A. Yes, sir.

Q. And the drawn forging is the completed thing which was manufactured by Worth Brothers Company and sold to the Midvale Steel Company. Is that correct?

A. That is correct.

Q. You have gone back to the ore stage. Of course, everybody that fabricates any steel at all has to go back to the ore stage, or has to buy material that has gone back to the ore stage. At what stage of the development of the material in your hands was there a point at which the destination of the material toward a shell was started?

A. When it was taken from the furnace and pierced.

Q. How many manufacturing steps, therefore, with reference to the destination of this material into shells specifically were taken by the Worth Brothers Company?

A. I would say two.

Q. What are those?

A. Pierced. Taken from the block, pierced. Then the forging is drawn.

Q. All the other steps preceding that were steps that, I suppose, are commonly taken with reference to the development of 55 material which has an ordinarily wide market for commercial purposes. Is that right?

A. Yes.

## Cross-examination.

By Mr. Frierson:

Q. Was there any difference between the process, that is, the process in the blast furnace, with respect to this material that was intended for these shells, and other material?

A. The process is just the same.

Q. Then, when you came to the making of steel, was there any difference there, any distinguishing feature between this steel and other steel used?

A. None except to meet the physical and chemical requirements of the French order.

Q. But it did require some difference from the ordinary steel made in your plant?

A. It required some difference, slight difference, in those from the plate steel.

Q. Therefore, when you got to the stage of making the steel, you made that steel with reference to the specifications in this contract, did you not?

A. Yes, sir.

Q. And you made it for the purpose of further carrying it into the manufacture of these shell forgings?

A. Yes, that is right.

Q. Was it expressly made for that purpose?

A. Yes.

Q. And then when you cut the steel into billets, you cut them of the sizes that would be required to make different sizes of shells?

A. Four different sizes, yes, sir.

Q. And when you cut it up in that way, it was then devoted exclusively to the use in manufacturing these shell forgings, was it not?

56 A. After it was in block form, yes, sir, because it was cut to weight and size required for the forging.

Q. That would be when it got in the shape of this first piece here?

A. That block would make a 220 forging.

Q. In other words, the cutting of it into that shape was devoting it to the purposes of this contract?

A. Yes, it was preparing it for the shell forging.

Q. For this very contract. At what time did the French inspectors put any sort of a mark on this material as it went through?

A. After the fracture for the inspection for piping. They inspected the blocks at that time.

Q. (Question repeated.)

A. At the time, after the blooms were fractured into billets.

Q. In other words, when they made any billets, they then marked them or stamped them for use under this contract?

A. Or passed it, yes sir, that the steel was O. K.

Q. That is, if the inspector passed it, he stamped it, gave it a mark, which identified it for use in this very contract?

A. He did not identify it other than after it was in the block state, because after that time it was heated and pierced.

Q. I understand, but it could not be used for this contract unless it had that stamp on it, could it?

A. No.

Redirect examination.

By Mr. Wintersteen:

Q. I forgot to ask you, to save a little time, as to the percentage of rejections of the material by the French inspector for the purposes which he had in mind in the development of those things with reference to their destination into shells.

57 A. At what point, do you mean?

Q. Well, what is the percentage of rejection in the block form?

A. I would say the very lighter shells about twenty per cent. On the heavier shells it ran as high as forty per cent.

Q. For what reasons were the rejections made?

A. Piping, blow holes, and small defects in the steel.

Q. Could you indicate from your recollection as to what proportion of rejections there was for piping and for other causes?

A. I could not recall that at the present time. Mostly piping.

Recross-examination.

By Mr. Frierson:

Q. There were rejections up to the completion of the last stage of the work done by Worth Brothers, were there not?

A. There were rejections for three stages. First the rejections in the block. Of course, after they were forged, there would be rejections of the drawn forgings, if they did not come up to the required dimensions.

Q. Take the case where they had been forged and drawn, and then there were rejections. What was done with those that were rejected?

By Mr. Wintersteen:

Q. If you know.

A. Well, a rejected forging, we would try to redraw it. we would try to draw it again to a slightly smaller diameter, which we call redrawn, to reclaim the shell.

By Mr. Frierson:

58 Q. Suppose it was finally rejected, though. Then what?

A. Scrap.

Q. Scrap?

A. Yes.

By Mr. Wintersteen:

Q. Do you know what was done with the rejected forgings?

A. I don't know.

Q. Why do you say "scrap," then?

A. Well, rejected as unfit forgings.

Q. For their purposes?

A. Yes, sir, to be shipped.

Q. Then what was done with those rejected forgings?

A. We have taken our rejections and sold them for sleeves.

Q. Were there any rejections by the French inspector after the material had then reached the drawing stage?

A. None after the block had been accepted for fracture.

Q. If there were any rejections after that stage, was it or was it not due to the inspection of Worth Brothers itself?

A. Our own inspectors inspected the shells after forging.

Q. Therefore, when the material had reached the drawn stage, the drawn forging, the inspection of the French inspectors stopped. Is that right?

A. That is right.

By Mr. Frierson:

Q. You mean that the French inspectors did not inspect it after the forging was drawn?

A. They did not inspect it after the forging was accepted for the fracture of the billet. After the block was fractured, in the billet, the inspector looked at the steel, and either accepted or rejected the steel.

59 Q. Didn't he inspect the forging before it was delivered to the Midvale Steel Company, after it was finished?

A. No, sir. Our own inspectors inspected the forging then.

Q. And the French did not?

A. The French did not.

By Mr. Wintersteen:

Q. I refer you to these exhibits here. What is this one?

A. That is a drawn forging.

Q. Exhibit No. 6. Is that anything more than cut so that you can see the inside of it?

A. That is all, except there may be different sizes.

Q. Different sizes?

A. That is all. Yes, sir.

Q. Do I understand that this umbrella stand, as I hold it up here, was what you delivered to the Midvale Steel Company?

A. That is right.

Q. Could that be fired out of a gun?

A. It could not.

The Court: Do I understand the witness to say that third exhibit (Pl. Ex. 5) there was in condition to be delivered?

Mr. Wintersteen: Yes. This is the same thing, only higher, and larger, for a larger shell. You may assume that I was asking that question with my hand upon this, No. 3.

By Mr. Wintersteen:

Q. I will ask you the same question. What is your answer to it?

A. The same. A forging.

Q. The same answer?

A. Yes.

60 Q. I notice here that this is hollow, to a certain extent. How much of a base is there unpierced?

A. About three inches in most cases. It will vary in different size forgings.

Q. I notice here that there is a very rough edge an irregular edge. Is that the common form in which the material went from your plant?

A. Usually, yes, sir. They would never be smooth on the edge. They would never be smooth on the edge from that process.

Q. From that process?

A. No, sir.

Q. I notice here on this section a lap, or an edge over the side. It does not seem to be shown on this sectional piece. It does not seem to be upon the No. — Exhibit. What is the cause of that lap?

A. It is caused by the stripper. The shell is drawn through a series of rings, on the outside diameter, and the plunger is on the inside, and, of course, after it goes through the last ring, it must strip it, and that is the cause of that mark.

Q. Is it common to have such an edge on these shell forgings?

A. A rough edge? I did not catch that.

Q. Is it common to have those edges upon those forgings as delivered?

A. If it would have been a cold forging, it would leave the mark on account of the heavy stripping.

Q. Is it a matter of any substance?

A. It does not make any difference.

Q. What happens to that edge when it passes through?

A. It is cut off.

The Court: I wish you would ask this witness to explain how this piercing is done, whether it is done while the metal is in a hot state, or how it is done.

61 By Mr. Wintersteen:

Q. How is that piercing done?

A. The block is heated at 2100 degrees F., placed in a container or die, which contains a bushing, the shape of the forging, No. 2, (Pliff's Ex. 4) I believe. It is pierced while hot, by a piercing bar entering through the block, and drawing the metal out of this bushing.

Q. Is the machine so constructed as that the piercing plunger stays at a certain point?

A. Yes, sir. There is 2,500 pounds water pressure in the press.

We have a stop on it and that governs,—that governs the stoppage of the cross head to where we want the base thickness.

The Court: That is what I wanted to get at. It is in the nature of a pressing or forging process, and not boring.

The Witness: Not boring. The block is dropped into a container, which is of the same diameter as the block. The piercing bar comes down. We then move the cross head into the block, and that pierces, and at the same time the metal flows up.

By Mr. Wintersteen:

Q. In other words, it is so viscous that the plunger goes through it just as if it were mush?

A. That is it, and the metal fills the plunger up, and fills this die, forming that Exhibit No. 4.

By the Court:

Q. All of the metal which is in your billet or round is in the forging afterward?

Mr. Wintersteen: Part of it.

A. All of it, except what we might lose in the heating. About one per cent, or one-half per cent.

62 JOHN L. COX, having been duly sworn, was examined and testified as follows:

By Mr. Wintersteen:

Q. What is your business?

A. Mechanical Engineer.

Q. Where are you engaged?

A. At the Nicetown Works, Midvale Steel & Ordnance Company.

Q. You say you are a Mechanical Engineer?

A. Yes.

Q. Give us a little of your training in that very valuable function and profession.

A. I took the degree of Mechanical Engineer at the Stevens Institute of Technology in 1887. On the 2nd of January, 1888, I entered the employ of the Midvale Steel Company, and I have been associated with the plant ever since.

Q. What year?

A. 1888.

Q. Over twenty years?

A. ~~Over~~ thirty-one years.

Q. Yes. You are pretty nearly the oldest inhabitant there?  
Very nearly.

Q. And what touch have you had with the methods and the extent of the fabrications of materials at the Midvale Steel Company during that period?

A. For the greater number of those years I was assistant foreman

of the forge department. Later I became assistant foreman of the shell department. Later, when the whole plant was reorganized, I became assistant foreman of the general projectile department.

Q. I fancy that you know something about shells?

A. I have worked a great deal with them.

Q. You recollect, perhaps, the arrangement made between  
63 the Midvale Steel Company and Worth Brothers Company  
for the purchase by the Midvale Steel Company of Worth  
Brothers Company of certain forgings in 1916?

A. I do not know the details of the arrangement made between  
the two companies. I know that we placed with Worth Brothers  
Company an order for a considerable number of shells we had on  
contract.

Q. And that contract was a contract for the delivery of certain  
shells, or material for shells, to the French Government. Is that  
right?

A. Yes, sir.

Q. I fancy, then, you know just what was done with the material  
when it came from Worth Brothers Company until it was delivered  
to the French Government. Is that right?

A. Yes, I am thoroughly acquainted with that.

Q. Will you take that material, those forgings, at the stage at  
which you, the Midvale Steel Company, received the material from  
Worth Brothers Company, and tell us the processes through which  
that material went, in detail, and the number of them, until the  
final shell was completed?

A. On receipt at the plant, the shells were unloaded in the ma-  
chine shop. The first operation consisted in placing them in a  
hollow spindle lathe, and slicing off roughly the excess length from  
the open end.

Q. You cut off the end of them?

A. Cut off the end of them, yes.

Q. Go ahead.

A. The second step consisted in turning the shell, mouth down-  
ward, over a centering mandrel, and drilling a center in the base, on  
which the shell could subsequently be turned, or machined, and be  
bored, also.

Q. What was the third step?

64 A. The third step consisted of centering the shell forgings  
as closely as possible at the mouth, the other center running  
in the hole drilled in the base, and rough turning the outside.

Q. That is what you call rough turning?

A. That was the first rough turning.

Q. On the outside of the shell?

A. Yes.

Q. What do you mean by "rough turning"?

A. Rough turning is turning with rather a large cut, and a  
rather coarse feed, so that you do not leave the surface smooth, but  
leave it rough. It is not accurate, but it is approximate.

Q. The idea is to decrease the outside diameter?

A. Yes, and to bring it approximately concentric with the inside.

Q. Approximately concentric?

A. Yes.

Q. That is to say, uniform, as related to its center on the inside?

A. Yes.

Q. That is the third step?

A. Yes.

Q. What is the fourth step?

A. The next step consisted in the finish boring of the shell, as concentric as possible with the outside.

Q. In other words, the first was rough bored?

A. No. Not boring yet. The first was turning.

Q. Then that is finished. Very good.

A. The boring was finished at the one setting.

Q. When you speak of "boring finished", you meant the diameter was fixed according to the final diameter?

A. Yes.

Q. That is the fourth stage. What is the fifth stage?

A. The next step was to put the forging over a mandrel  
65 that fitted the inside of it closely, and recenter the case.

Q. Describe what a "Mandrel" is?

A. It is a bar of steel, turned to suit the configuration of the interior of the shell body at that stage.

Q. You said the forging was re-centered. What is the significance of the word "Re-centered" as distinguished from the word "Centered"?

A. It was impossible, on account of the rough outside surface of the shell while boring, to get the outside and the inside concentric in the boring operation, when the material was set by the rough surface. It was, therefore, necessary to correct the center, which had been originally drilled in, so as to correspond to the accurate bore.

Q. In other words, if I understand you correctly, this material known as or described as "Plaintiff's Exhibit No. 5" was irregular in its exterior?

A. It has not been turned, and the steel is slightly irregular on the inside. It is irregular on the outside.

Q. So that it would not have a center which would be uniform, and you, at a certain time had to re-center it. Is that right?

A. Yes.

Q. I suppose that relates to the ultimate destination of the material as a shell for the purpose of accurate firing. Is that right?

A. Exactly.

Q. So that nothing should happen in the way of its wobbling in flight?

A. Yes, sir.

Q. That is the fourth step? Finish boring?

A. Yes.

Q. Take the fifth step. That was the fifth step you have just given?

A. Yes.

66 Q. What is the sixth step?

A. After re-centering, the shell was finish-turned, set by the new center in the base and by the mouth, which had already

been finish-bored. This brought the outside and the inside as nearly concentric as we could get them at that stage.

Q. In other words, you were turning the shells so as to harmonize the outside and the inside?

A. Yes.

Q. So that the interior contour should be properly related to the shell in its final form?

A. That came in the next step.

Q. What is the next step? The seventh step?

A. The next step consisted in facing the base to the maximum thickness permitted by the drawings.

Q. Explain that, the "Facing of the base", keeping in mind that the base is the closed end.

A. It is the closed end. A cut is run down there so as to leave the remaining metal the maximum thickness that the specifications permitted.

Q. Then, I gather, when the material came to you, the base of the shell was not in accordance with the thickness which the specification provided?

A. No. It varied considerably. It was impossible even with the stops on the columns to stop the press at exactly the same position. The base would be thicker or thinner than was intended.

Q. You say it was cut?

A. A cut was run down the face of the base.

Q. An exterior cut or an interior cut?

A. An exterior cut. The interior had been already finished.

Q. That is the seventh step?

A. Yes.

Q. What is the eighth step?

A. The shell forging is turned around, and the excess length sliced off the open end. It was only sliced to an approximate length at first. Then we made a slice afterward. The end was cut off the second time.

Q. That is, it was cut off roughly, then it was cut off finally?

A. Yes, sir. More accurately.

Q. Would that eighth step be a finished length, or merely a preliminary length?

A. A preliminary finished length.

Q. That is the eighth step?

A. Yes.

Q. What is the next step?

A. The next step consisted in hand grinding off any roughness that might be left on boring or turning the interior.

Q. Was the hand grinding inside or outside?

A. Inside.

Q. That is what is called inside grinding?

A. Inside grinding.

Q. What is the next step?

A. The next step was a very important one and a very difficult one to do correctly. It consisted in heating in a furnace with circular doors, the shell for a little distance back from the open end,

and then placing it in a horizontal forging press with a conical shaped die, or, to be more accurate an ogival shaped die.

Q. It means pointed?

A. It is like a Gothic arch.

Q. Go ahead.

A. The die advancing, closed in the open mouth of the shell, which up to that time was a cylinder and gave it the form for the first time, of a shell body.

Q. That is what is called—

A. Nosing.

Q. Putting an ogival shape to the material. Is that right?  
68 A. Yes, sir.

Q. I call your attention to the fact that those interesting gentlemen who came up from Washington in 1916 to inspect the material in the process of development in Worth Brothers plant, reported to the Commissioner of Internal Revenue, and rejected the claim of Worth Brothers Company for refund of taxes, on the ground that when the material left Worth Brothers Company and was delivered to the Midvale Steel Company it was nosed in. Is that true?

A. No, it was not true.

Q. Do I understand that the nosing-in of this material as it came from Worth Brothers Company is what was done in the tenth stage of the process of the development of the material in the hands of the Midvale Steel Company?

A. That is correct.

Q. I understand also from what you have said that this process of nosing-in was not a mere machining process, but was a heat treatment. Is that correct?

A. No, it was a hot-forging process.

Q. How far down from the mouth of the shell material was the material heated in order to bend this in?

A. It depended upon the size of the shell. Roughly, the forging would be heated for about five inches from the mouth, that much being red hot, and probably ten inches back of that it was black hot.

Q. Do I understand your testimony to be that the heating of this body was limited to a certain point, and wholly for the purpose of making the shell pliable, so that it could take the die?

A. Yes, sir.

Q. And be pressed in?

A. Yes, sir.

Q. And the rest of the material was kept cool. Is that right?

69 A. That is correct. It was kept away from the heat.

Q. How did you insulate, so to speak, that material at the bottom, that section of it?

A. The shells were put in a furnace whose doors were fairly near the diameter of the shell itself, so that the heat did not have a chance to get out of the furnace. There is another very important function accomplished by the nosing operation and giving the ogival shape to the outside of the shell.

Q. Tell us about that.

A. It is necessary to get the correct form on the interior, which is altogether different from the parallel wall of the rough shell forging, or essentially parallel wall.

Q. Explain that, and if it is necessary to give us your explanation with reference to that, come over here and show the Court and the rest of us what the fact is. You said there was a different function than that of nosing-in the shell that is performed by the act of nosing. What is it?

A. There are two different functions. One is to produce an exterior diameter, an exterior form, which may be the final one, or not, depending on the method you are following. The other is to produce an interior form, which is acceptable.

Q. Very good. Then, I gather that the interior form of a nosed shell is special in character with reference to the function that the shell performs. Is that correct?

A. It is.

Q. In what respect is the change in diameter and form of the interior of the shell not uniform from the nose down?

A. It increases according to a curve, which is not the same for all of the calibers,—each shell has its own shape,—the object being to thicken up the metal at the nose, the open mouth of the shell first, so as to permit of its machining in order to make the thread which holds the fuse; and secondly, to produce below that thread a shoulder on which the gas-tight joint between the fuse and the shell body is formed.

70 Q. Then, do I understand you to say that in this nosing process, as a result of the nosing process, the interior diameter of the shell at the extreme mouth—I am talking at random—I mean the thickness of the wall of the shell is thicker than a little further down?

A. Decidedly thicker.

Q. And it is necessary to have it thicker for what purpose in the function of the shell, as a practical body?

A. For two purposes. First, permitting the cutting away of some of the metal in order to form a thread for the fuse, and secondly to have below that a shoulder on which the gas-tight joint between the fuse and the shell body can be made.

Q. Then I fancy that the ogival die, that is, the thing that is in the shape of an ogival die—

A. The shape of the ogival die, and the shape of the metal going into it, and the degree and kind of heat,—all three of them are vital.

Q. In other words, you have to relate the ogival die to the degree of heat of the material to which you apply it. Is that right?

A. No. I should prefer to put it the other way. You determine the die, then you heat correspondingly.

Q. I see that this "Plaintiff's Exhibit o. 5" has an apparently uniform thickness—it appears to have an apparently uniform thickness on the wall. I will say comparatively a uniform thickness. Perhaps it is not absolute. It has a comparatively uniform thickness at the mouth, and farther down. Is that correct?

A. It is really tapered, because it would not come off the drawing mandrel otherwise.

71 Q. But in the final form of the nose the wall is not as thick at the mouth as it is a little further down. Is that right?

A. It is thickest a little below the mouth because of the taper on the outside. It tapers, really, both ways from a point about two inches below the mouth.

Q. We have gotten the tenth step. What is the next step?

A. The forgings were then put in a continuous annealing furnace, and annealed above their critical temperature, in order to use the scientific expression, to normalize their microscopic constituents.

Q. That is very clear to all of us, but perhaps we could make it clearer.

A. The effect of that is to break up the coarse grain.

Q. The forging is then annealed in order to normalize its microscopic constituents?

A. Yes.

Q. In the first place, let us get the definition of the word "Annealed." We all know in this court what "Annealing" is, but this case may go to the upper court, where they may not know so much as we do down here. First describe what "Annealing" is.

A. A general definition of "Annealing" of steel would be heating your material above what is known as its critical temperature,—

Q. Yes.

A. And slowly cooling it.

Q. Slowly cooled?

A. Yes, sir.

Q. That is distinguished in the art from a rapid cooling, which rapid cooling, by quenching, makes what is called brittle steel. Is that right?

A. It would make hard steel if it had been heated above its critical temperature and quickly cooled.

Q. Annealing makes it tough. Is that right?

72 A. It makes it soft and tough, the object being to reduce the grain size.

Q. We get the word "Annealing" there. You said you annealed it to normalize its microscopic constituents. Then, I fancy that the material which has been heated to a certain temperature changes the relationship of its microscopic constituents very materially, the molecules or atoms, whichever you call them, in your science, that constitute the units of the material, have a different relationship to each other by reason of that process. Is that right?

A. That is it. They become in a state of flux above the critical temperature of absorption.

Q. They get in a state of flux, and relate themselves differently.

A. That is correct.

Q. Like a lot of beans in a bag, if you jump them up and down they form a new relationship to each other?

A. Yes, sir; but in this case the beans get much smaller.

Q. To normalize the microscopic constituents?

A. Yes.

Q. "Normalize" of course, is a very happy word, because it means making the constituents have a proper and happy relation to each other. Is that right?

A. That is correct. -

Q. That is the eleventh step, is it?

A. Yes, sir.

Q. Take the twelfth step.

A. The next step was sand-blasting the shells, exterior and interior—no, I will correct that. On the exterior only.

Q. If I understand you correctly—I do not want to exhibit more information than you have, but let me see if I understand what you have said. In the process of nosing, am I correct that there is necessarily a scale produced, because of the heating process to which the nose has been exposed, and that there is a scale produced on the exterior of the shell, near the nose?

A. That is correct. Also on the interior.

Q. You sand-blast the shell to get that off?

A. Therefore, you sand-blast the shell to get off that scale, as well as the scale which is the result of heating for annealing.

Q. I understand that. I asked the question with reference to nosing, but I really meant annealing, because you have passed the nosing step. That is the twelfth step?

A. Yes, sir.

Q. Let us take up the thirteenth step.

A. After we sand-blast the shells, we heat them above their critical temperature, and quench them in an immense volume of water, in a special machine.

Q. What is the object of that?

A. That is to harden the steel.

Q. You say the shell is heated above its critical temperature. What is the heat to which that material is exposed?

A. It will run from 1600 to 1575.

Q. What is the heat to which it is exposed in the annealing process?

A. We heat it a little higher. I should say about 1650.

Q. That is for the purpose of hardening it? The heating to 1575 to 1600?

A. Yes.

Q. You first anneal it, and normalize the microscopic constituents?

A. That is correct.

Q. And then you say that softens it to some degree, and makes it tough?

74 A. Yes.

Q. Then, you harden it again, and you take the next step?

A. That is correct.

Q. That is the thirteenth step. What is the fourteenth step?

A. After the hardening the shells were placed, base downward, in a gas furnace, heated to a temperature of 1750, and left there for a length of time depending upon the chemical composition of the heat of the steel.

Q. You say you put them in a furnace at a temperature of about 1750 degrees F., but how high do you heat the material?

A. It does not get very hot. It was not left long enough.

Q. It would get pretty hot, would it not?

A. The temperature would be a little over 1000 in most cases, I should say, at the average, according to the length of time the shells were left in, from 1000 to 1250.

Q. What is the object of that process?

A. That was to remove the excess brittleness associated with the hardness. You cannot harden a thing part way properly. You must harden it all the way, then soften it.

Q. You have to have the thing just right?

A. Yes.

Q. You soften it, which makes it tough, then you have to harden it, then you have it just right.

A. You draw it after the hardening.

Q. All with a view to the ultimate destination of the shell, or I mean of the material into a shell?

A. Exactly. It would not answer for a shell without going through the hardening and softening steps.

75 Q. Why would it not?

A. It would break up in the gun, on impact of the powder gas.

Q. In other words, this shell has to stand the impact, the terrible force to which it is exposed while in the gun, and yet not withstand the force of the high explosive content when it strikes. Is that right?

A. That is true.

Q. Having the object of producing, as a result of that, the thing you are aiming at. Is that right?

A. That is right, up to a certain point. The principal object of having the steel of these high physical qualities is to make the walls thin, so as to use more powder—more bursting charge, in the interior. A shell may be detonated with a very much smaller powder charge than that one actually carries.

Q. You have given us the fourteenth step. Let us have the fifteenth step.

A. The shell is next tested for hardness with the Brinell Testing Machine.

Q. What is the Brinell Testing Machine?

A. The Brinell Testing Machine consists of what I could perhaps best liken to a pair of scales, consisting of a weight applied indirectly to one end of a lever, the other end of which carried a ball, ten mm. in diameter of hardened steel. This ball was pressed by a standard weight into the surface of the shell and the diameter of the impression was measured. That was done to determine the uniformity of the heat treatment.

Q. That is the Brinell Testing Machine?

A. Yes.

Q. Then, do I understand that besides this Brinell Testing Machine you take certain specimens?

A. From the shell.

Q. From the shell?

76 A. Yes.

Q. And you press this machine into the body of the shell?

A. Yes.

Q. And then you take out a certain portion?

A. No, sir. It simply makes a dent.

Q. Do you take out the dent afterward?

A. No. There is sufficient metal in the diameter of the shell body to turn out the dent.

Q. That is all subsequently machined?

A. Yes.

Q. You turn out the dent?

A. Yes.

Q. The object of that is to test for hardness?

A. For uniformity of hardness.

Q. Supposing that the material does not stand the test. What happens?

A. It must be retreated.

Q. In other words, you discard that shell at its then stage, or else you put it back, and it goes through the process again, in order to fulfill the test?

A. That is correct.

Q. If that Brinell Testing Machine does not produce satisfactory results as to every shell—

A. Every shell must lie between certain limits to be satisfactory. The Brinell Testing Machine is not used to determine the physical properties of the shells. It is to determine the physical uniformity of the heat, because they cannot cut up every shell and take a piece out of it. Representative shells from each melt are cut up for taking the physical tensile test of the specimen.

Q. That is the fifteenth step?

A. Yes, sir.

Q. What is the sixteenth step?

A. I meant that as only one step. There were two tests entirely different.

77 Q. You meant that as one step?

A. Yes.

Q. We do not want to get too many.

A. Two entirely different tests are applied.

Q. What is the sixteenth step?

A. The shells are sand-blasted, inside and outside.

Q. What for?

A. To get off the rough scale of the treatment.

Q. You have had a previous sand-blasting?

A. Yes, but I put another scale on. There were two scales.

Q. You have had another heat treatment?

A. Two. Hardening and drawing.

Q. Therefore, do I understand that after each heat treatment you have to sand-blast?

A. No. We only sand-blast where it is necessary. It was necessary to sand-blast after the first annealing, in order to remove the scale. Otherwise, the steel would not be uniformly hard. We would have hard and soft patches. After hardening and drawing it was necessary to sand-blast again, in order to get rid of the scale from the interior, which could not be gotten out in any other way, by our methods, and also to save the machine tools from cutting this scale on the exterior, when the final machining was done.

Q. You have given us the sixteenth step?

A. Yes, sir.

Q. What is the seventeenth step?

A. The shell was carefully measured and a length determined, which would give the proper weight. The shell was then faced off in length at the nose, to its assigned length, and the throat was then bored and threaded.

Q. That is the first time that you got inside the shell, excepting in a general way?

A. And back on the fourth step, I think it was.

Q. Here is a situation where a very important stage, as I understand it, emerges; namely, the shaping and determining of the diameter of the throat. Is that correct?

A. Yes.

Q. Will you explain that? In order to make the face reasonably related to the final form, and also to make the throat in accordance with the final form,—will you explain that, so that the Court, and the rest of us, may thoroughly understand that stage? Do you want to come over here?

A. No. It is not necessary. I have a picture in my mind.

By the Court:

Q. Explain what you mean by "Throat"?

A. That is the reduced internal diameter of the forward end of the shell.

By Mr. Wintersteen:

Q. The interior of the nose?

A. Yes.

Q. On the interior?

A. Yes.

Q. The forging, you said, was placed on a lathe?

A. A turret lathe, and faced to the length ordered.

Q. "The point faced back to the proper length." What do you mean by "Faced"?

A. As the shell revolves in the lathe, a tool is run across the edge of the open mouth, to shorten it, and that is technically termed "Facing."

Q. In other words, that tool is applied right where my hand lies?

A. That is correct.

Q. At the end of the shell?

A. Yes.

Q. What is done in that facing process?

A. The shell is shortened.

Q. Is it cut off?

79 A. Cut off.

Q. How much is cut off?

A. Oh, it depends altogether on the capacity of the shell as determined by its measurement.

Q. Is it cut off uniformly?

A. It is cut off to a uniform length for each shell. The shells vary.

Q. According to the type of the shell?

A. According to the weight of the shell. The walls are never of the same thickness or the same weight.

Q. That facing off is accompanied by an operation upon the throat?

A. After it is faced.

Q. Of course, "face" is a different thing from "throat"?

A. Yes.

Q. What do you do with the throat?

A. The throat is then bored to a diameter,—the smallest diameter that is shown there.

Q. Bored?

A. Bored.

Q. What do you mean by "bored"?

A. Its diameter is increased. The interior diameter is increased by machining.

Q. It is cut by the boring process?

A. It is cut by the boring process.

Q. What do you mean by "boring," it being hollow. I want to be perfectly clear and understand just what the additional process, in the way of shaping the interior, is to which it is exposed, and if by "boring" you mean cutting the interior wall. Is that correct?

A. Cutting the interior wall.

Q. How far do you cut down the interior wall?

A. Until it runs out into the swelling opening of the body.

Q. You mean you cut down—

80 A. It is cut down parallel.

Q. You mean you cut it down until the ogival head disappears?

A. You cut down until the metal on the inside disappears, until you cannot cut any further.

Q. Yes. What is the object of that—cutting the throat?

A. It is one of the steps that is followed to bring the shell to the final size. It simply unifies things there.

Q. You have been changing the face at the extreme top?

A. Yes.

Q. And you have been cutting the throat. Now, in addition to cutting the throat, what else have you done in that step?

A. Then, the upper part of the throat must be counter-bored, or

made larger, before threading, as there is to be an internal shoulder for a gas check seat. Then you cut the thread above the seat.

Q. You speak of threading. What is threading?

A. Cutting a screw on the interior.

Q. Is that threading for the purpose of taking the thread of the fuse?

A. It is.

Q. Just like any screw? Just like an established thread for the insertion of any screw? You had to have channels, through which the screw edges go. Is that right?

A. That is so, but in this case it is far more accurate than in the ordinary screw.

Q. By the way, why is it more accurate?

A. French inspection.

Q. It is a very difficult thing to produce?

A. Very.

Q. You could not take any chances on any mistakes, because the whole thing would be discarded. Is that correct?

A. That is correct.

Q. It is all done with reference to very nice mathematical measurements?

A. Yes; very close measurements.

Q. Pursuant to specifications. You have gotten down to the seventeenth step. What is the eighteenth step?

A. I might, perhaps, before referring to the next step, point out the fact that if that throat, the reduced diameter in the interior, the smallest diameter in the interior, is not sufficiently long, the shell is condemned, even though everything else is right about it. The French want to have sufficient strength to screw the fuse tightly, and if that shoulder is not longer than four mm. the shell is condemned.

Q. What do you mean by "shoulder"?

A. The shoulder is formed on the inside between the throat, which is the smallest bore, and the smallest diameter of the thread, which is a much larger bore.

Q. In other words, it is a protuberance?

A. A protuberance, in the cavity of the shell.

Q. So that the whole longitudinal length, so to speak, of the end of the shell is not uniform? That is to say, it is different at one particular point from another?

A. No two shells nose just the same.

Q. And no two parts or portions of that particular end are the same?

A. Not quite; no, sir.

Q. They have to be arranged with reference to a specific form, having in mind the destination of the shell for its purpose as a useful projectile?

A. Yes; that is true.

Q. And in order to be a useful projectile it must have its nose, interior and exterior, properly related to the fuse which goes into it. Is that correct?

A. That is correct.

Q. That is the seventeenth step?

A. Yes, sir.

Q. What is the eighteenth step?

A. It was impossible to cut the threads accurately with a machine. Therefore, we had to hand tap them out, using special cutters by hand.

Q. Then, as I understand it, you had not only to treat the nose, interior, with a machine, but you had also to supplement that by hand?

A. By hand dressing.

Q. Hand cutting?

A. Yes.

By the Court:

Q. Explain that hand tap, or cutter, as you described it.

A. It is a steel tool carrying on the end a thread which is an exact counterpart, only a trifle larger than the thread on the fuse. It has on it cutting edges, and it is screwed in. Wherever there is a rough place on the thread, left by machining, this hand work takes it out. The rough places, being a little smaller, are brought up to size.

By Mr. Wintersteen:

Q. Do I understand you apply this hand cutter to every shell?

A. To every shell.

Q. That is the eighteenth step. What is the next step?

A. The nosing of the shell has drawn it out of balance. The shell is no longer rectilinear. It is curved.

Q. The shell is no longer rectilinear—it is curved?

83 A. It is curved. In the process of nosing, the shell is more or less bent. One wall may be a little thicker than the other.

Q. One wall may be a little thicker than the other?

A. Due to irregularity in the heating up and nosing.

Q. I see. As I understand it, one side of the shell may not be so hot as the other?

A. That is correct.

Q. And in the nosing process, it may be thrown out of gear entirely?

A. It may.

Q. By reason of the fact that one side is more viscous and responds more quickly to the ogival die than the other?

A. That is right?

Q. What do you do to the shell to correct that?

A. The shell body is placed on knife edges and rolled to determine whether it has a preponderance in any one particular point.

Q. As I understand it, here are two knife edges (illustrating)?

A. No, they are round.

Q. They are round edges?

A. Yes, sir.

Q. Pretty nearly the same, except it is totally different. Why do you call them "knife edges"?

A. That is a technical term for anything of that character.

Q. I was misled by the word "knife." You tell it.

A. It is placed on two very accurate, horizontal, machined, round bars of steel, and is rolled along these bars to see whether it has a tendency to assume any one fixed position. If it has, it is evident that there is one heavy side. We then, by putting counter-acting weights on the exterior, determine by the proportion between the weight we add in restoring balance and the weight of the shell, the amount the center line is out of position, and we re-center the base to correspond.

84 Q. Can you correct it by that method?

A. Yes. Very accurately.

Q. It does not involve any discarding of the shell at that stage?

A. It might, but very seldom. It very rarely occurs.

Q. This is what you call, if I correctly understand you, a re-centering process?

A. Re-centering.

Q. So as to re-establish the center which may have been put out of gear by the immediately preceding processes?

A. The processes of nosing, annealing, and heat treatment, all of which tend to distort.

Q. All of which has the direction of having a particular shell absolutely perfect in its center?

A. That is right.

Q. So that it will go straight?

A. It must fly straight.

Q. That is the nineteenth step?

A. Yes.

Q. What is the twentieth step?

A. There is a rough cut taken over the body to determine whether that correction is sufficient. The shell is re-turned.

Q. So that, after you have re-centered it, you have to re-turn it?

A. Yes.

Q. By "Re-turning" I suppose you mean cutting?

A. Taking such a cut off the body of the shell as will bring it once more to a cylinder.

Q. Then, I fancy, all this material you have been working on has not its final diameter or thickness, because provision seems to be made for cutting right along?

A. Until the very last stage, there is metal left on the exterior.

85 Q. That is the twentieth step?

A. Yes.

Q. What is the twenty-first step?

A. The shell having been balanced up, re-turned, and everything being right, the body is then turned to finished sizes.

Q. You have gotten up to the twenty-first step. You have got the cylindrical form about to its finished dimensions?

A. Yes, the cylindrical portion.

Q. That is, the cylindrical body?

A. Yes.

Q. The cylindrical body, I think you said, did you not?

A. Yes.

Q. That, I suppose, speaking accurately, is distinguished from the ogival head, which is not part of the cylindrical body; that is to say, it is not part of the cylindrical portion of the body; that is, the twenty-first step. Do you have any step after that with reference to the ogival head?

A. That is the next step.

Q. What is that?

A. Turning the ogival head to size.

Q. That is you turn the cylindrical body to its finished dimensions, then you turn the ogival head?

A. Yes.

Q. That is the twenty-second step. What is the next step?

A. Then we grind the bourrelet.

Q. There is a very interesting thing. The bourrelet. Will you tell the court what the bourrelet of a shell is?

A. These French shells are made with a diameter at the rear of the head, which is slightly larger than the body back of it, to the rear of it, and that maximum diameter is called the bourrelet.

86 Q. In other words, that is something that a person casually looking at the shell does not see? The diameter of the shell a foot from the nose is greater than farther down?

A. I am not sure of that. I should judge it was a little more than a foot. There is a maximum diameter back of the nose.

Q. I will not use the word "foot." I might say at a point down farther.

A. Yes, that is correct.

Q. That is greater than down farther?

A. Yes, sir.

Q. And the bulge at that point is called the bourrelet?

A. Yes. That is also the maximum diameter, the parallel maximum diameter.

Q. What is the purpose of the bourrelet in the shell?

A. It fits very closely the top of the lands of the rifling of the cannon. That centers the front end of the shell in the bore of the gun.

Q. By "lands," I understand that means the extension proper—

A. The ribs of the bore of the gun.

Q. That fits the lands. Why is it necessary to have the diameter of the shell a certain distance down from the nose a little larger than farther down the shell? Why does it have to be narrowed as it gets toward the base?

A. In some shells the body is of a uniform diameter from end to end, but that is the exception. It simply means that by the adoption of the bourrelet the shell body has a clearance. It does not rub on the gun as the shell goes out.

By the Court:

Q. The shell body has a clearance?

87 A. A clearance on the body. A more accurate fit of the head.

Q. So as to avoid that much friction?

A. To avoid friction.

Q. It goes out easier. Is that right?

A. Yes, sir, for this type of shell.

By Mr. Wintersteen:

Q. It gets a good start, and there is little to stop it after it gets started. Is that right?

A. Yes. It is just like pushing a small plug, a short plug, through a tube instead of pushing a long one.

Q. You have got the cylindrical body then turned to finish dimensions, and the ogival head then finish-turned to final dimensions. What is the next step?

A. Grinding the bourrelet.

Q. The front bearing surface?

A. The front bearing surface.

Q. That is the twenty-third step.

A. Yes.

Q. What is the next step?

A. The next step,—we cut the band seat.

Q. I do not understand that. You say you cut the band seat. That means the place where the band is to go?

A. The recess into which the band is hammered.

Q. That is the first step that you have mentioned in the processes that you have given where preparation is made for the application of another part. Is that correct?

A. That is right, except so far as the threading goes. There is a step in preparation for the reception of the fuse.

Q. The threading of the throat?

A. Yes, sir.

88 Q. That is also a step in preparation for the application of the fuses?

A. Yes, sir.

Q. The copper band is placed on the body of the shell near its base?

A. That is right.

Q. And you have threaded it longitudinally around the circumference of the shell?

A. Continuous. A complete circular recess. An annular recess.

Q. That is when cutting for the band?

A. Yes.

Q. A seat for the band?

A. Cutting for the band score or the band seat.

Q. That is the twenty-fourth step?

A. Yes, sir.

Q. What is the next step?

A. The next step consists in facing the base to the length which will give the final weight that the shell must have.

Q. When you speak of the final length, that is really facing the base to the thickness—

A. There is a tolerance in the thickness of the base, which can be a little greater or a little less in thickness, depending upon the weight of the shell. It must lie within certain limits.

Q. As I understand it, you cut off the base, and make it thinner, in order to bring the shell to its final dimensions?

A. No, in order to bring the shell to its final weight.

Q. I understand that. You first did some work on the base? The base is faced? You faced it down part way?

A. Correct.

Q. Then, you cut it off?

89 A. Cut it off to the final length, and incidentally we removed the little center nubbin, which is shown on the bases of the shells in their unfinished condition.

Q. In other words, anybody who happened to look at this would find that there is a little protuberance here (indicating)? There is a little knob left at the base?

A. Yes.

Q. I understand, when you are facing this case, you cut off this knob?

A. Yes, sir, they are cut off.

Plaintiff's Exhibit No. 5, have that knob on, I see?

A. Yes. That is right.

Q. Why is that knob left on?

A. It carries the center of your shell for the machines.

Q. Why is that knob left on up to that stage?

A. Because if you did not have that knob on there you would have to have a hole in the end of the shell, which would weaken the base. You would have to have a corresponding center in the end of the shell, which would weaken the base.

Q. Now, you have refaced the base. That is the twenty-fifth step?

A. Yes.

Q. What is the next step?

A. In boring the throat before cutting the thread in the nose of the shell, there is always a little roughness left on the inside. That is removed by the use of a hand grinder.

Q. In other words, you perfect the throat?

A. Perfect the throat.

Q. You perfect the throat by a hand grinder?

A. Yes, sir.

Q. That is the twenty-sixth step?

A. Yes.

90 By the Court:

Q. Is that additional hand work to that which you referred to with regard to the thread?

A. No, this is below the threads.

Q. Below the threads?  
A. Below the threads.  
Q. That is below the shoulder?  
A. Yes.

By Mr. Wintersteen:

Q. The twenty-sixth step. The roughness of the throat then is ground off by hand?

A. Yes, sir.  
Q. What is the next step, the twenty-seventh step?  
A. The shell is then subjected to hydrostatic pressure.  
Q. Internal?  
A. Internal.  
Q. Internal hydrostatic pressure?  
A. Internal hydrostatic pressure.  
Q. For what purpose?

A. To determine two particular points—in fact, three. First, whether there is any leak in the base which, if it existed, would mean that the gas from the powder would find its way into the cavity of the shell and burst it, destroy the gun, and ail the gunners. Secondly, to determine whether there are any cracks due to the heat treatment, which would burst the shell body under the hydrostatic test, and also in action, in use; then, thirdly, to determine whether the steel is of the necessary tensile strength to withstand the shock of firing. If it is not, it swells up, and will not return to within certain limits of its original size, and the shell is rejected.

Q. Rejected in that stage?  
A. Yes, sir, for any one of those three things.  
Q. That hydrostatic pressure is applied internally?  
A. Yes.

91 Q. What amount in measure of hydrostatic pressure is placed upon the interior of the shell?

A. The pressure per square inch?  
Q. Yes.  
A. I do not remember that now, but it was something like four thousand or six thousand pounds, if I remember correctly. Those are the figures, as far as my recollection serves me.

Q. Per square inch?  
A. Yes, sir.  
Q. And if any cracks or leakages are exposed or discovered, you reject the material?

A. That is right. This pressure varies for every calibre of shell.  
Q. Is that the last stage at which the material runs the gauntlet of success or failure?

A. No, there is still another inspection, last of all.  
Q. I will not ask you about that until we come to it. That is the twenty-seventh step you have just been talking about?  
A. Yes.  
Q. What is the next step?  
A. That hydrostatic test having been applied with cold water, the

shell might rust. So it is then given a bath of oakite, in hot water.

Q. What is oakite?

A. I don't know what it is. It is a salt soluble in water, which has the effect of preventing rusting.

Q. And what is the purpose of the process?

A. To prevent the interior of the shell from rusting.

Q. To prevent the interior of the shell from rusting?

A. Yes, sir.

Q. That is the twenty-eighth step?

A. Yes, sir.

Q. What is the next step?

92 A. After cooling, the shell is suspended by the mouth, in a sound-proof room, and there struck with a hammer, to determine whether it rings with a full chime, or sonority.

Q. To determine whether there are any cracks?

A. Any cracks.

Q. You can tell very readily if a thing is all right if it sounds well?

A. If it has a clear, full, sonorous ring. If it is cracked, it will have a dead tone.

Q. Supposing it does not respond to this test? What then?

A. The shell is rejected.

Q. At that stage?

A. Yes, sir.

Q. That is the twenty-ninth step?

A. Yes.

Q. I fancy, then, that there are many stages from the process of taking the material in the forging stage, until it develops into the form that you have given us, where the prospects of the thing getting through are either slight or great, depending upon the character of the work done?

A. A great many.

Q. What percentage of rejections, if you can give it to us, in the hands of the Midvale Steel Company, did the material go through?

A. It varies according to the calibre somewhat, but the average figures are a little in excess of sixteen per cent.

Q. That is to say, sixteen per cent., roughly speaking, of the material that came from Worth Brothers, had been rejected, and did not go into shells?

A. That is right. They were never sold by us as shells.

Q. Is that twenty-ninth step the last step?

A. No, there is still one more.

Q. What is that?

A. That is out of order. The last thing of all. The next step is to put on the band.

Q. Let us see. We have got to the twenty-ninth step. We have gotten to the band. We have gotten the shell developed, nosed-in, and the thread cut. What do you next do?

A. The band is next hammered in.

Q. The copper band?

A. The copper band.

Q. Tell us that process.

A. A copper strip is placed in the groove near the base of the shell, resting between the specially shaped dies of a slow-moving air hammer, and the shell slowly turned by the hand, while the hammer pounds the copper band into the groove. The groove is dovetailed in cross-section, that is to say, under-cut at the edges. The copper band has a curved cross-section, so that as it mashes out, the two inner edges extend into the under-cut groove.

Q. What is this I have in my hand?

A. That is a piece of the French 280 mm. band.

Q. Is that a copper band?

A. That is a heavier band. That is the two hundred and ninety-three.

Q. In other words, what I am showing you are two bars of copper?

A. Yes.

Q. Where did you get those?

A. They were bought from outside contractors. I do not know from whom. They came from more than one place.

Q. Therefore, am I correct in understanding that you buy those bars of copper?

A. That is right.

Q. For the purpose of using them as copper bands around a shell body?

94 A. Right.

Q. And you put them around the shell body by hammering them into the band seat that has been already cut out of the base of the shell body?

A. That is correct.

Q. And is that a distinct part from the finished body?

A. Oh, entirely separate and distinct.

Q. You buy these in the market. Is that correct?

A. We buy those in the market.

Q. You do not make that copper?

A. No, sir, we do not.

Q. You did not buy that copper band from Worth Brothers Company?

A. No, we did not.

Q. Where did you buy those copper bands?

A. I do not remember. We bought them from two or three concerns. One in Newark, New Jersey, I think, but I do not remember now the name of the concern.

Q. You hammer the band into the shell body and at the base, or near the base?

A. Yes.

Q. What is the next step?

A. The next step is to turn it to size. In a 280 shell, in addition to the profile, the sloping profile, there are two or three grooves that are cut into the band.

Q. This is a 280 shell (indicating)?

A. Yes, sir.

Q. You have two sort of channels cut around the groove?

A. Yes, sir. The 293 is plain, without the grooves.

Q. Why is it that the 293 copper band has a smooth surface, and the 280 mm. shells have grooves cut in them?

95 A. I do not know the reason that actuated the French Artillery Officers in making that design.

Q. But they wanted it that way?

A. They wanted it that way.

Q. Then, the band is turned to finished dimensions. You mean the band is cut and shaped and arranged according to the specifications required by the French Government?

A. Yes, sir, that is right.

Q. What happens after you have got the band on, and got it turned?

A. After this step is completed it is then ready for final inspection by the French, except that before this is done we give it another light sand-blasting with steel shot, inside to polish it.

Q. That is the last step?

A. That is the last step.

Q. Then, it is ready for what?

A. Final French inspection.

Q. And if it passes muster, what then happens to it?

A. It is then greased, inside and outside, paraffine paper wrapped around the bourrelet, and the shell is boxed.

Q. Then, am I to understand, when this material comes from Worth Brothers Company, and after it has come into your hands, before the copper band is placed around it, it goes through twenty-nine processes?

A. Yes, that is right.

Q. Some of which are machine processes and some of which are heat treating processes?

A. Yes, and some are hot forging processes.

Q. And then there are two processes involved in the application of the copper band to the forging?

A. Yes, sir.

96 Q. And then when the copper band is put on there is one process to which the composite thing, the shell or the shell body and the copper band, is subjected, namely, a sand-blasting?

A. That is right.

Q. Then, you are ready for the French inspection?

A. Yes, sir.

Q. The agreed upon statement of facts in one feature is to the effect that the cost of the processes through which the material goes up to the forging stage at which the Midvale Steel Company received the material was 40 per cent. of the total cost of the shell body, and the cost of developing the material through the various processes to which the material was subjected in the hands of the Midvale Steel Company was 60 per cent of the total. What is your experience as an engineer in connection with the Midvale Steel Company, with thirty years' experience, as to that being about right?

A. I should say that is very close to right. It varies a little according to calibre, but I think it would be just about that figure.

Q. The Midvale Steel Company in its history has fabricated material through all the stages involved in this case, has it not?

A. It has fabricated material, but, you see, has not done some of the initial steps done by Worth Brothers. The Midvale Steel Company had no blast furnaces.

Q. No. I am asking you the question whether in stating this percentage, you state it from practical experience, in connection with those processes at the Midvale Steel Company's Works?

A. Oh, yes.

By the Court:

Q. You say the Midvale Steel Company has no blast furnace?

A. The Midvale Steel Company has no blast furnace, no  
97 Q. In their work they begin with the pig iron?

A. They begin with the pig iron, scrap iron, and ore.

By Mr. Wintersteen:

Q. But you are familiar with the processes involved in the manufacture of pig iron from ore, of course?

A. Only from general reading.

Q. What changes in the physical properties of the material, such material as came from Worth Brothers Company, were effected by the processes through which the material went in the hands of the Midvale Steel Company?

A. The exact physical properties of the material, of the steel, which came from Worth Brothers Company, are not known to me except through my general knowledge of what steel in that condition of that composition, would have.

Q. The reason that it is not known to you is because—

A. I never tested it.

Q. You never took it home and made a study of it?

A. I never took the trouble to cut out a piece of it.

Q. But you do know?

A. I know about what it would show.

Q. In the processes through which it has gone?

A. Yes, sir. Very closely.

Q. Go ahead.

A. It would show as a tensile strength about 85,000—eighty to eighty-five thousand pounds.

Q. 85,000 pounds?

A. Tensile strength. The stretch would probably be fifteen per cent. It might even be higher than that. It might be eighteen per cent. The shells as accepted by the French Government had  
98 to show a minimum of 113,780.

Q. 113,780?

A. Yes.

Q. What is the tensile strength?

A. About 85,000 pounds.

Q. Will you explain what the 85,000 pounds of tensile strength of the material such as it came from Worth Brothers Company means, and what the 113,780 means?

A. That was the minimum.

Q. Tensile strength, minimum?

A. Yes.

Q. According to the French specifications?

A. Yes.

Q. Explain that.

A. By that I mean that a bar cut from the steel, turned up with a cylindrical stem, roughly a half inch in diameter—I think the French bars were 9-16 inches in diameter and about four inches between measuring points—pulled apart longitudinally, by enlarged ends, required in one case about 85,000 pounds per square inch to break it. In the other case the minimum would be 113,780 pounds.

Q. What practically is the necessity for a tensile strength in shells of a minimum of 113,780 pounds?

A. I can only answer that from general reading, that the steel must be strong to resist the shocks and stresses to which it is subjected in firing.

Q. In other words, that is something which common sense would teach one. You must have strong steel?

A. Yes. The walls are very thin. It must be strong steel for such a thin section.

Q. Because of the exposure to which it is subjected to violent shock?

A. Yes.

Q. You have spoken of the changes in tensile strength. Let me ask you as to what was done to the inside of these shell bodies, or material, by way of substantive changes, with reference to fitting the inside to the uses to which the shells as a whole were to be applied?

A. It was finish-machined first, twice subjected to sand-blasting, to get it smooth, and twice ground, in whole or in part.

Q. Had the material from Worth Brothers Company any value whatever for the purpose of being assembled with other units and made into a shell unless the processes thru which it subsequently went were given to it?

A. None whatever.

Q. Why not?

A. To begin with, the physical properties of the material were—

Q. No, I mean material of this shape and having physical properties that went to make up a unit called a shell forging,—why could not it be utilized without the fabrication?

A. The exterior was the wrong size. It is not round. It is not straight. It is too soft. It is not the shape of a shell. There is no way to contain the powder in it. There is no way to attach a fuse to it. It is the wrong weight. It is too rough on the inside, even supposing the sizes were right.

Q. And, of course, any fuse put in at the end would drop down to the bottom?

A. Certainly.

Q. So as to get the thing comprehensively before the Court will you explain something that I have not asked you about yet, the function of this base plate, which does not exist upon the French shell, but is used in the English shell?

A. The English are very much afraid of premature explosions, of the shells bursting in the gun, and instead of having a solid base in the shell, with the chance of piping existing in it not being detected by any inspections to which the shell is subjected, they pierce the shell from the base instead of from the nose. The base of the shell is closed by a disc, called an adapter or base plug, in which the grain of the steel, if I can use so crude an expression, is at right angles to the axis of the length of the adapter.

Q. The grain of this base plate runs differently from the grain of the shell body?

A. Yes, sir.

Q. They do not work in harmony with each other and they are not intended to work in harmony with each other?

A. If there were any shrinkage in the disc, adapter or base plug for the shell, it would run cross-wise. Therefore, it would not have been exposed at the surface to the action of the powder gas.

Q. In the British shell is the tube a narrow tube or is it just as the French shell, a tube which is pierced to the extent of the certain limited distance for the base?

A. It is originally pierced only for a limited distance from the base toward the nose, but afterward the nose is drilled thru.

Q. Is it drilled thru the interior, or merely a hole?

A. It is a drilled hole, a small hole.

Q. Then the base plate is put on?

A. No. That goes in the base, where there is the large hole.

Q. I am speaking about the base.

A. I thought you were speaking about the nose. A small hole was drilled thru it.

Q. That closes the base?

101 A. Yes, that closes it,—the adapter or base plug, such as you have your foot on.

Q. And the only difference between the two types of shells is that one has four parts, if you can count the high explosive content as a part, and the other has five parts?

A. Yes, sir. I have not added them up. Most of the British shells have more pieces than that. They have also a nose piece and a set screw.

Q. The nose piece is something other than a fuse, then?

A. Yes. It is a piece of steel.

Q. What is the purpose of the nose piece?

A. To make it easier to cut a more accurate thread. It is easier to cut an accurate thread in a small piece than in a large one.

Q. That extension is screwed in, for the purpose of fitting it in, so that the fuse can fit in?

A. Yes.

Q. Is that right?

A. Yes.

Q. Will you explain the function of a fuse, and what is the development of a practical shell?

A. A fuse is an apparatus which is screwed usually into the mouth in the forward end, and sometimes in the base end, of a shell, to bring about its explosion.

Q. And what is it made of?

A. The principal ingredients generally are brass and aluminum. Sometimes it is nearly all brass. Sometimes it is mostly aluminum.

Q. Is it a single unit or structure, or is it a composite structure?

A. A composite structure.

At one o'clock P. M. a recess was taken until 2 o'clock P. M.

102

Two o'clock P. M.

Present: Parties as before noted.

JOHN L. COX, heretofore sworn, recalled.

By Mr. Wintersteen:

Q. When you were on the stand prior to luncheon, you were about explaining the fuse with reference to these parts, and the function of the parts, and the function of the fuse as a whole.

A. The function of the fuse is to cause the detonation of the bursting charge inside the shell body. It is an assemblage of parts, each of which has a definite function to perform in bringing about the explosion.

Q. What kind of fuses are there?

A. I am not an expert on fuses, but, generally speaking, there are two principal kinds. The impact fuse and the time fuse. There is also a combination fuse, which embodies principles of both.

Q. See if I am right in my knowledge of what the difference between those is. An impact fuse is one that explodes immediately upon impact, and a time fuse is where a certain time elapses before the exposition takes place.

A. Not quite. The impact fuse may either burst the shell immediately, or after an interval of time, in which case it is called a delayed action fuse. A time fuse bursts the shell after a given interval of time. The combination fuse bursts the shell on impact if the time element does not work.

Q. I have got that right. Something happens in the timing apparatus, and it explodes instantly, then, on impact?

A. Yes.

Q. How many parts are there in a fuse?

103 A. It depends on the type of fuse. There may be anywhere from 20 to 40 parts. Maybe more.

Q. Where do you buy those fuses?

A. They are made by quite a number of different concerns. There is a company that manufactures them in Bloomfield, New Jersey. The Bethlehem Steel Company makes them. I think they are made at Eddystone by the Eddystone Ammunitions Corpora-

tion. They are also made to a considerable extent in New England.

Q. The Midvale Steel Company never made them?

A. Never made any.

Q. To your knowledge, Worth Brothers Company never made any?

A. They are certainly not equipped for it.

Q. The corporation which desires to develop a shell, or develop the parts of a shell into a shell, either purchases them, or manufactures them itself, and assembles the material?

A. Sometimes the manufacturer, as in the case of the Bethlehem Steel Company, makes the component parts of the shell.

Q. So far as the Midvale Steel Company is concerned, it is agreed upon and it is a fact, I believe, that the thing you did was to furnish the completed shell body and the copper band as another part attached to that completed shell body, to the French Government?

A. That is correct.

Q. And let them screw in the fuse and load the shell?

A. Yes.

Q. Is that right?

A. Yes.

Q. When the shell body was completed, with the copper band attached to it, was the shell body in condition, then, to have the fuse attached?

104 A. It was.

Q. Without any alteration?

A. Without any alteration.

Q. Am I to understand, therefore, that this Exhibit entitled "Finished 280 m/m shell body, with band" and this Exhibit No. 2, entitled "Finished 293 m/m shell body, with band," are finished, ready for the fuse to be screwed in?

A. Those shells have gone so far in the manufacture, but there is some defect in those shells. Otherwise they would not be here. What the defect is, I do not know. They are both of them rejects. Neither of them is in condition to be shot by the French Government. I do not know what the particular defect is.

Q. So far as a layman looking at them is concerned, they seem to be finished?

A. They seem to be finished. They have been rejected by the French Government. Possibly for roughness of the thread. Maybe there is some slight error in weight, or balance.

Q. Then, these two are illustrations of those 16 per cent rejections?

A. Yes, sir; they are part of the 16 per cent rejections.

Q. They are part of the 16 per cent rejections?

A. Yes, sir.

Q. As a matter of fact, it does not necessarily follow, I suppose, therefore, that even after the material comes into your hands, that it will go into shells, and be fired as practicable shells?

A. Oh, no; that does not follow at all.

Q. They have been running the gauntlet of all the inspections, through all the stages?

A. Yes, sir.

Q. I think we know enough about the fuse. I want to ask you one question, in order to get the thing comprehensively before the court, as to the thickness of the shell body, in its various longitudinal portions, as it is finished, as related to the shell forging as it comes into your hands?

A. They are different. Some parts are probably not more than one-half as thick as they were when received by us, and I am inclined to think, particularly in the case of the 293 shell, which has a very large diameter, close to the nose, rather a blunt nose, that the wall thickness is thicker than it was when received by us. It certainly in both cases is very much thicker than before it entered the nosing die.

Q. Do the specifications call for a detailed series of dimensions throughout the length and breadth of the shell?

A. Yes.

Q. And you have to conform with those, and have to fit them in, and the material when it comes into your hands from the Worth Brothers Company is of uniform thickness, longitudinally speaking, and you have to un-uniform it, so to speak?

A. Yes, that would be true. Of course, it is not uniform when it comes to us, but it is not as uniform when it leaves us, because although every cross section is supposed to run uniform, longitudinally it is very varied.

Q. Why is it that you do not have specimens here of the 220 and 270 m/m shells? I suppose because you did not want to have too many of them in the court room? Is that the idea?

A. Those two sizes of shells are not developed to the final finished condition at the Midvale Nicetown Works. They were done by contract.

Q. But so far as the fabrication of the material is concerned, after it has reached the shell forging stage, and is in the process of development into the final finished shell body, I presume the 106 steps taken as to those smaller size shells are exactly the same as the larger shells?

A. It is essentially the same process. It must closely parallel the steps we take.

Q. In other words, the number of steps would be practically the same?

A. Practically the same, yes, for the same percentage of rejects. You can make short cuts in places, but at expense.

Q. But the fabrication involves the same character of detail?

A. Yes.

Q. And attention?

A. Yes, sir. Absolutely.

Q. From the machining standpoint and the heating standpoint and the other standards that you mentioned as to the 280 and the 293 m/m shells?

A. Yes, sir.

Q. I will not ask you, because it has been admitted in evidence as part of the agreed upon statement of facts, as to the outside diameters, the inside diameters, the approximate lengths and the approximate weights of the material as it came into your hands and as it left your

hands, but I will ask you if those facts stated in the agreed upon statement of facts correspond to the facts, in your experience, comparing the data as to the outside diameter, the inside diameter, the approximate length and the approximate weight of the material after it came into your hands and what it was when it left your hands?

A. Yes. I see nothing amiss in that at all.

Cross-examination.

By Mr. Frierson:

Q. When the fuse has been attached and the explosives put into the shell, it is then a loaded shell, is it not?

107 A. I should call it so, yes.

Q. As it was delivered by the Midvale Steel Company to the French Government, it was an unloaded shell?

A. An unloaded shell.

Q. And that unloaded shell was the shell forging delivered by Worth Brothers to the Midvale Company after it had been subjected to the processes of machining which you have described and had the copper band attached to it, was it not?

A. It was a steel forging received by us after it had the machining operations described, and after it had the hot forging operation and after the heat treating operations described, plus the addition of the copper band.

Q. That is, it was the forging delivered to the Midvale Company after it had been subjected to the processes and the machining that you have described, and had the copper band attached to it?

A. That is correct.

Q. As to some of the shells delivered to the French Government, the Midvale Company did all of the work and conducted all of the processes from the pig iron ore, did it not?

A. It did.

Q. And in that respect it went through exactly the same processes which were conducted as to other shells by Worth Brothers?

A. No, sir; that does not follow, nor was it the case.

Q. Why not?

A. Because we do not have the same machinery at Midvale as they do at Worth's.

Q. You accomplished the same results, then?

A. We accomplished the same results by other methods.

108 Q. In other words, you conducted the manufacture up to the same point that Worth Brothers conducted it?

A. Yes.

Q. The details may have been different?

A. Yes.

Q. But you carried the manufacture up to that stage?

A. Yes.

Q. There were other shells as to which the Midvale Company contracted for manufacturing to be carried further than Worth Brothers carried them on their shells, were there not?

A. I presume the Midvale Company made contracts. I have never seen the papers.

Q. You said as to these larger shells, that the Midvale people themselves did not do the same work that you have been describing here, that they did it by contract?

A. I do not remember that I said it was by contract.

Q. The smaller shells?

A. The smaller shells.

Q. I was mistaken as to the larger shells, but as to some of the shells the Midvale Company itself did not begin to work until a stage considerably beyond the stage at which Worth Brothers stopped on their shells?

A. No, that is not correct.

Q. Isn't it?

A. No, sir. In no case did we begin the manufacture of a shell body further along than those which were received by us from Worth Brothers.

Q. With respect to those that you mentioned in your examination-in-chief, what did the Midvale people have to do with them?

A. The Midvale Company put through the processes and the steps that I have described, the shell body forgings that they received from Worth Brothers, and also a very considerable number of other forgings.

109 Q. I understood you to say that as to some of the shells you could not produce them at all, because the Midvale people themselves had not carried them through the stages that they had carried these?

A. That is correct.

Q. What did you mean by that?

A. I meant to say they were not machined at the Midvale plant. They were machined to the form of shell bodies elsewhere.

Q. That is just what I asked you.

A. That was done by contract.

Q. As to a part of these shells, you have said that the Midvale Company did all the work?

A. Yes, sir.

Q. As to others Worth Brothers had done the work up to the stage that has been described here?

A. Yes.

Q. And as to still others the work subsequent to that time was done by other companies. Am I right about that?

A. You will have to define what you mean by "That time."

Q. The time at which Worth Brothers stopped on theirs.

A. That is correct.

Q. What companies did work beyond that stage?

A. The American Clay Machinery Company and the Baldwin Locomotive Works.

Q. That was work done by them on shells delivered by the Midvale Company under its contract, to the French Government?

A. I presume they were delivered by us. I do not know.

110 Q. As to those shells, how far did those companies carry on the work?

A. To the same stage as the Midvale Company did at Nicetown.

Q. They completed, then, the unloaded shell?

A. They completed the unloaded shell body.

Q. They delivered them to the Midvale Company and then your company delivered them to the French Government?

A. I presume you would call it technically a delivery. They were not physically delivered to the Midvale Company.

Q. They were delivered to the French Government in fulfillment of the Midvale Company's contract?

A. I judge so. I have not seen the contract. You are asking me about things which I am not thoroughly informed about. I have not seen the contracts.

Q. Taking up that last class, where the work was finished, not by the Midvale Company but by some company contracting with it, the Midvale Company paid that company a fixed price, did it not?

A. I don't know.

Q. How is that?

A. I don't know, no.

Q. They paid them some price, did they not?

A. I suppose they would not have done it for nothing.

Q. And that price, of course, included a profit made by that company?

A. I do not take that for granted. I take it for granted that they would not have intended to make them at a loss.

Q. They would not have intentionally done that?

A. Not intentionally, but I think they did.

Q. In 1916 there were a great many companies in this country engaged in work on munitions, were they not?

111 A. I heard so.

Q. There were very few companies, however, who manufactured shells from pig iron on during all of the stages of manufacture themselves, were there not?

A. I am not certain that there were more than two.

Q. You are sure there were very few?

A. Yes.

Q. By far the greater number of concerns engaged in manufacturing or working on munitions were engaged in doing some particular part of the work, like forging, were they not?

A. That is what I should gather from my reading.

Q. That is a matter of common history?

A. Yes, but I do not believe everything I see in the newspapers.

Q. The contract of the Midvale Company with the French Government, which has been produced in evidence, provides that all of the manufacturing work shall be done at the plant of the Midvale Company or of the Baldwin Locomotive Works, and that no part of it shall be sublet to another company without the written approval of the French Government. Have you the written approval of the French Government under which this order was let to Worth Brothers?

A. I have never seen any.

Q. Do you know of any such paper?

A. No.

Mr. Wintersteen: I think, if your Honor please, that is not germane to this inquiry. Here is a tax that is paid. Worth Brothers

paid it upon certain material fabricated. Had Mr. Sterrett asked me for that paper, or any other paper, the whole books and papers of the Midvale Company and of Worth Brothers Company would have been at his disposal. Of course, the French Government, having accepted these shells, as passing from Worth Brothers, through the

112 Midvale Company, and having had its inspectors at Worth Brothers Company during this time, it may be presumed that the necessary steps looking to Worth Brothers Company fabricating the material had been complied with, but if you want to adjourn the court until I hunt up the records, I am at your service.

Mr. Frierson: No. I am not attacking the legality of what was done at all. I am assuming that such a paper was executed.

Mr. Wintersteen: Of course.

Mr. Frierson: If it was not, I do not care, except that, if it was, for another purpose I wanted that paper, but I do not want to stop the trial.

The Court: As I understand it, there has been no testimony by the witness or anybody else that he was in custody of the contracts under which these shells were made.

Mr. Frierson: This witness says he does not know anything about it. That ends that.

The Court: That is what I understood. The fact that he does not know anything about it does not show that it does not exist.

FRED H. OVERDORF, having been duly sworn, was examined and testified as follows:

By Mr. Wintersteen:

Q. What is your business?

A. Accountant.

Q. What was your business in 1916?

A. I was an accountant at Worth Brothers Company.

Q. Have you made up a statement showing sales, cost and profit of shell forgings of Worth Brothers Company during 1916?

113 A. I have, yes, sir.

Q. I show you a paper and ask you what that is?

A. That is the statement.

Q. That is the statement you referred to?

A. Yes, sir.

Q. And is this statement the statement upon the basis of which the company's ammunitions tax return was made?

A. It is.

Q. For 1916?

A. Yes, sir.

Q. And the tax assessed against us pursuant thereto was paid?

A. I presume it was paid, yes, sir.

Q. Upon the basis of which the return was made?

A. Upon that return, yes, sir.

MR. WINTERSTEEN: I offer that statement in evidence, and ask that it be marked "Plaintiff's Exhibit No. 2."

The statement just referred to is marked "Plaintiff's Exhibit No. 2 T. R. P.", and reads as follows:

*Fred. H. Overdorf*

PLAINTIFF'S EXHIBIT No. 2, T. R. P.  
ACCOUNTING.  
STATEMENT SHOWING SALES, COST AND PROFIT ON SHELL  
FORGINGS.

**STATEMENT SHOWING SALES, COST AND PROFIT ON SHELL  
FORGINGS.**

Philadelphia, October 31, 1918.  
**WORTH BROTHERS COMPANY—1916**

WORTH

See letter 8-1-17 to John L Cox.  
FHQ-M.

## 115 Cross-examination.

By Mr. Frierson:

Q. About how much did the special machinery which the Worth Brothers Company had to provide for making these shell forgings cost?

A. The special machinery, as I recall it, which we intended to amortize, cost about \$2,000,000.

Q. About \$2,000,000?

A. \$2,000,000.

Mr. Wintersteen: I offer in evidence the following Exhibits:

Plaintiff's Exhibit No. 3, steel block for making 220 m/m shell bodies.

Plaintiff's Exhibit No. 4, pierced steel block for making 220 m/m shell bodies.

Plaintiff's Exhibit No. 5, rough forging for making 293 m/m shell bodies, being a sample of the material as delivered by the Plaintiff to the Midvale Steel Company.

Plaintiff's Exhibit No. 6, rough forging for making 280 m/m shell body, this differing from the preceding Exhibit only in that a section is cut through so as to expose the interior. Also a difference in calibre, being for a different size shell.

Plaintiff's Exhibit No. 7, rough machine forging for making 293 m/m shell body, not nosed, being the first development of the material purchased in the Midvale Company's hands from the Plaintiff.

Plaintiff's Exhibit No. 8, rough machine forging, for making 280 m/m shell body, not nosed, being the same as the preceding Exhibit excepting having to it a different size shell.

Plaintiff's Exhibit No. 9, sectioned, 280 m/m shell body, being a development of the material up to the stage of the hydrostatic test.

116 Plaintiff's Exhibit No. 10, entitled "Finished 280 m/m body with band," showing the grooved band attached, and the nose threaded, ready for the insertion of the fuse, being a completed shell body with the band as delivered to the French Government as to that size shell.

Plaintiff's Exhibit No. 11, entitled "Finished 293 m/m shell body, with band," being the same as the preceding exhibit, a finished product, under the contract with the French Government, and differing from the preceding exhibit only that it relates to a different size shell, that the copper band at the base was smooth, and not grooved, so as to comply with the specifications of the French Government in respect of that particular size shell.

Also two bars of copper, of different lengths and widths, purchased by the Midvale Steel Company, to be attached to the shell body by the processes detailed by the witness. I offer those two bars as Exhibit No. 12.

Also for the purpose of indicating the various parts of the shells as such, but not with reference to the particular parts of this type of

shell, a fabrication entitled "Finished machine adapter or base plug for 12 inch British shell", for the purpose of informing the court as to what in the British type of shell constitutes another part. I offer that as Plaintiff's Exhibit No. 13.

I also offer in evidence two sample fuses, one entitled "Fuse used in the manufacture of shells," and the other entitled "Percussion fuse for high explosive shells, sectioned, the two differing from each other substantially, in that one is sectioned for the purpose of showing the interior parts to some extent. I offer those as Plaintiff's Exhibit No. 14.

I also offer, for the purpose of the record, three photographs, constituting Plaintiff's Exhibit No. 15, being photographs of the material previously offered in evidence, and which have been exposed to the observation of the court, consisting, as follows, in their order.

- A. Rough rolled and sliced block for 220 m/m French shell body.
- B. Rough punched, undrawn forging for 220 m/m French shell body.
- C. Rough drawn back forging for 280 m/m French shell body.
- D. Finish bored and rough machined forging for 280 m/m shell body, ready for nosing.
- E. Finish machined 280 m/m French shell body ready for application of rotating band, and rolled copper bar for rotating band.
- F. Finish machined, banded, 280 m/m French shell body.
- G. Section through 280 m/m finish machined French shell body.
- H. Rough drawn black forging for 293 m/m shell body.
- I. Finish bored and rough turned forging for 293 m/m shell body, ready for nosing, and rolled copper bar for rotating band.
- K. Finish machined 293 m/m shell body ready for application of rotating band.

Mr. Wintersteen: There is another feature of the case I would like to bring out as to the uses as to which this material can be developed into.

F. P. GOERTZ, having been duly sworn, was examined and testified as follows:

By Mr. Wintersteen:

- Q. What is your business?
  - A. Director of materials.
- 118 Q. Where?
  - A. At the Cameron Machine Company, Brooklyn, New York.
- Q. What is the Cameron Machine Company?
  - A. We build slitting and rewinding machines for slitting any kind of paper, fabric, from wide weaves into narrow weaves, and re-rolling it, making it suitable for automatic machinery, and other special uses, such as rubber tires, bandages, corsets, tape, aeroplane materials, and so forth.

Q. What is the function of those machines when you manufacture them?

A. It is really a cutting operation.

Q. And for cutting what sort of material?

A. Well, any kind of cloths, fabrics, papers.

Q. Will you describe that machine that you manufacture?

A. It is a machine, the main features of which is a hardened steel shaft composed of sections, or cylinders, against which a V-shaped cutter runs, and between those two members the goods to be cut are passed, splitting it into narrow widths, and then re-rolling it by an ordinary rolling process. In other words, to roll bandages, goods that would come about 40 inches wide, any mill roll, as the weaving loom delivers it. It is put on the rear end of the machine and passed through the machine, between this cutting cylinder and the V-shaped cutters and cut in an inch, or an inch and a half, whatever width of bandages are required. It is then rolled up in ten-yard lengths, having a hole in the center about three-eighths of an inch, and in that way they are delivered back and ready for usage. That same operation is true of any kind of material that will lend itself to that particular cutting operation.

Q. In order to get the machine you manufacture before the court comprehensively and completely, so that it can be understood, where do you get the material which you use in making these 119 machines, particularly the cylinders, the cutting cylinders, that you have to have in making these machines?

A. The cutting cylinders we make from discarded shell forgings.

Q. Am I to understand that this machine that you have has a cylinder of some considerable length, and is a composite thing, composed of sections?

A. Yes.

Q. A tubular form?

A. Yes.

Q. You say you get your material to manufacture these cylinders for this cutting machine from discarded shell forgings. What do you do to those discarded shell forgings? How do you assemble them and combine them in order to make your cylinders?

A. We take these discarded shell forgings, cut them off, cut them into lengths ranging from eight inches to fourteen inches in length. We machine them both inside and outside, forming a concentric cylinder of approximately a half to three-quarters of an inch wall. This is then key-seated and recessed on the inside for our special and particular purpose. It is then carbonized and hardened, then finish-ground. The cylinder when it is completed must be glass hard, and not very soft.

Q. You cut them up into lengths, you say?

A. Probably eight to fourteen inches.

Q. Do you cut one shell forging into eight inches, and then do you take another and cut that into eight inches, and then do you put them up longitudinally against each other?

A. We have a shaft running through the center. We slide these over the shaft.

Q. Then, it is in the nature of a shoe. They are in the nature of shoes, then. They go over the shaft?

A. Yes, sir.

120 Q. How many are up against each other, end to end?

A. That would depend on the width of the machine. Our machines run from 42 inches to 130 inches in width.

Q. How many of those shell forgings would you use to make one of your shafts?

A. Forty-two inches would take approximately four to five.

Q. Look at these shell forgings that I have in the room here, and tell me what use that shell forging has in your business.

A. It has just the use that I have described, for making those cylinders. We could take that particular shell forging that you have your foot on there and make it into a cylinder for our particular machine.

Q. You would cut it up, I suppose, into eight inch lengths? You could make two or three of these sections out of this one shell forging?

A. Yes, sir.

The Court: That is Exhibit No. what?

Mr. Wintersteen: That is Exhibit No. 5.

By Mr. Wintersteen:

Q. I will show you a book. What do you call your machine?

A. The Cameron Slitting and Rewinding Machine.

Q. I show you a paper book, and ask you what that is?

A. That is a catalogue of the machine that we make.

Q. Will you pick out and mark with a pencil which of these illustrations in that book most nearly illustrates the cylinder that you use or that you manufacture with the use of those shell forgings?

A. Yes.

(The witness marks a photograph on page 14 of the book just referred to, submitted to him.)

121 By Mr. Wintersteen:

Q. Is this a theoretical or a practical use of these shell forgings you are speaking of?

A. It is a practical use.

Q. Tell me how long you have been in this business?

A. Since 1897.

Q. I fancy that during the last three years you have had considerable opportunity to get hold of some discarded shell forgings?

A. I have.

Q. Of what sizes?

A. 3.8. 4.7. 6.3. 155 m/m, and ten-inch.

Q. Are these sizes ten inches?

A. Yes, sir. That is about the size.

Q. About this size—10 inch (indicating)?

A. Yes, sir. That is about the size, without actually measuring them.

Q. From what concerns have you bought discarded shells?

A. May I look at my notes for that?

Q. Yes. Then tell us how much you have bought, and how many machines you have made.

A. From the Allegheny Steel Company, at Brookings, Pennsylvania, 40 tons, 4.7 shell forgings. The Grand Iron & Steel Company, Detroit, 29 tons of 10 inch shell forgings. The Evans Machine Company, Bridgeport, Connecticut, 32 tons, 3.8, and 36 tons 4.7. The Bridgeport Projectile Company, 31 tons of 4.7. The Standard Steel Car Company, 70 tons of 155 m/m. The C. W. Bliss Company of Brooklyn, 64 tons of six inch shells. We had negotiations also which did not materialize. Do you want them?

Q. You, you may give them.

A. We had negotiations with the Hydraulic Press Steel Company for a carload each of 4.5 and 3.8. The American Steel Foundry Company, of Ohio, a carload of 10 inch shells. The Canadian Government, at Ottawa, Canada, for several cars of 4.5 rough shell forgings.

Q. What is the particular value in the manufacture of your machines of these shell forgings over the material that you discontinued prior to the coming of these shell forgings into the market for the making of your machines?

A. Uniformity of composition.

Q. What did you use prior to these shell forgings being on the market?

A. Drawn seamless tubing.

Q. Attached?

A. Attached. It is a composition of drawn tubing. It does not look as nice as these shell forgings.

Q. Let me see if I understand you. Here is a cylinder, which is an assemblage of a half dozen pieces of discarded shell forgings, which you have in eight inch lengths, and the cutting edge, the outer of the knife, that is supposed to cut fabric, like paper or cloth, goes against the edge of this cylinder. Is that right?

A. The outer surface, yes, sir.

Q. You have to have, therefore, something that is uniform in texture, something that is hard and which does not wear?

A. Yes.

Q. And do I understand you to say that you find that more valuable for the purposes than the ordinary tubing you discontinued bought?

A. Yes, sir.

Q. What amount have you bought during the last two years, would you say, of these discarded shell forgings, in tonnage?

A. It would average close to—I guess around 270 to 300 tons, for the last three years.

Q. Who are the people that your machines are sold to in the commercial market?

123 A. Well, paper mills, rubber tire factories, corset mills, textile mills, paper jobbers, cloth jobbers, clothing manufacturers and aeroplane manufacturers.

Q. Any concern that wants a fabric cut into uniform sizes, and then rewound in the same process, is a concern that you appeal to. Is that right?

A. Yes, sir.

Q. Take the International Paper Company—those large rolls of paper. Are those cut on your machines?

A. All newspaper rolls are cut on our machines and rolled up.

Q. How about the people that are selling toilet paper, which is rolled into bundles?

A. The same thing.

Q. That is cut on your machine?

A. The Goodrich Tire & Rubber Company, the Goodyear Tire & Rubber Company. In fact, all of those people have them. They have from eight to ten of our machines cutting canvas and other fabric used for making rubber tires.

Q. Are you in the market today for discarded shells?

A. Yes, sir.

Q. For those purposes?

A. Yes, sir.

#### Cross-examination.

By Mr. Frierson:

Q. When did you first use the discarded shells for that purpose?

A. We started in 1916.

Q. What time in 1916?

A. I cannot just tell you about that but it might be in the latter part of the year.

Q. And before that, so far as you know, that use had never been made of discarded shell forgings?

124 A. Not by us, for reasons.

Q. And you have simply used them since because you have found that you could use them and could get them cheap?

A. Not necessarily, no, sir.

Q. You buy them by the ton, do you not?

A. Yes, we do.

Q. How much a ton do you pay for them?

A. Anywhere from \$50 to \$70.

Q. A ton?

A. Yes, sir.

Q. You have said that you can take a forging, represented here by Exhibit No. 5, and cut it up and make these cylinders. You can do the same with this Exhibit, Exhibit No. 10, being a finished unloaded shell. You can take that and cut it up and use it for the same purpose, can you?

A. We could, but we would not.

Q. Why wouldn't you?

A. Well, we would be foolish for buying that much excess metal that we could not use. That nose end would not be any use to us. The wall might be turned down too thin. I would have to measure the inside of that shell before I could really answer that question intelligently.

Q. Is there any reason why with the exception of the nosing part of it that this could not be used in just exactly the same way you say that you have used them?

A. If that was big enough—no, we would have some work.

Q. To use Exhibit No. 5 would you carry it through much the same process as this Exhibit No. 10 has already been carried through?

A. Well, we might have to duplicate some of the processes.

Q. And, therefore, this Exhibit No. 10 cut up into sections 125 could be used just the same as Exhibit No. 5, cut up into sections?

A. Part of it could, yes.

Q. The part that is—

A. Between the ring, and where it starts getting smaller, we might be able to use that.

Q. You have not found it feasible to do that because you can buy some of the others?

A. Yes.

Q. In the fall of 1916, or until the latter part of that year, there was no demand in your line of business for forgings of this kind, was there?

A. That was for a reason that there was not. The simple reason was that we had let out a contract to make these particular parts to another concern. We had a stock enough of tubing ahead. So we did not have to worry.

Q. Also for the further reason that until the manufacture of shells had been going on in this country for some time, and a good many had been discarded, there were no forgings of that kind to be had, were there?

A. Well, I disagree there, because I made inquiries through the trade to have forgings made for our particular purpose, but there would be nobody to take our order, for the simple reason that everybody was bought up on Government contracts.

Q. I mean prior to the war. There was not any such things as those forgings in the market, was there?

A. Forgings?

Q. Yes.

A. Forgings of all kinds were on the market before the war, yes, sir. You could get any kind of cylindrical forging you wanted before the war.

Q. You could get forgings before the war?

A. Yes, sir, by the same process, certainly.

Q. But you would not have a forging that would be anything like that, would you?

A. Like what?

Q. Like that Exhibit No. 5.

A. Exhibit No. 5. Absolutely so. When shell forgings are all over, that is what we are going to do.

Q. That is a thing, though, that you have learned and developed since 1916, is it not?

A. Not necessarily, no, sir. That is nothing but mechanical reasoning.

Q. But, as a matter of fact, this thing had not been in use before that time?

A. Well.

Q. For that purpose?

A. Base tubings are virtually the same as that.

Q. And the only reason you use that is that this can be made to serve the same purpose as the tubing you formerly used?

A. Well, it serves a better purpose.

Q. And it serves a better purpose because, having been rejected for the purpose for which it was made, you get it at a cheap price?

A. No. I don't agree with you.

Q. Why don't you?

A. For two reasons. I will say this, as to why it is better, it gives us about 95 per cent protection in our process, which the tubing does not. A tubing will not exceed 75 per cent. Then again, when we wanted to have forgings made, which we had in mind, in the year of 1914, we could not get them for the reason that all the hydraulic presses in the country were flooded with orders, from foreign countries. We could not get our orders from the forge. We even went so far as to have some steel made into billets, and had them rough bored out, took the solid steel and bored it out, made the cylinder first, and then bored it out.

Q. Did you say how much you paid for this per ton?

A. Between \$50 and \$70 a ton.

Q. What was the price of scrap steel?

127 Q. A. I could not really answer that. I don't know.

Q. Is not that almost the price of scrap?

A. Well, very near, I should judge.

Q. In other words, you got it at a price that is almost equal to the price of scrap?

A. Yes, but that does not change the composition of the steel, in my estimation.

Q. What I mean is this: these things have no value beyond that which they would sell them for scrap?

A. To us they have more than that.

Q. That is what you paid for them, is it not?

A. If the seller is willing to sell at two cents, I don't know why we should pay six cents for them. That is sure.

Q. For that reason there is no more value for them at any thing more than about the price of scrap iron?

A. To us there is more, yes, sir.

Q. I mean, when you came to buy them, that is what you paid for them?

A. Yes, sir.

Redirect examination.

By Mr. Wintersteen:

Q. Will you look at another book which I show you, and I ask you to pick out and mark the photograph in there which most nearly represents your product and the cylinder that you make from discarded shell forgings?

A. Yes.

(The witness marks a photograph in the book just shown him on pages 9 and 12.)

Mr. Wintersteen: I will offer in evidence these two books identified by the witness as "Plaintiff's Exhibits Nos. 16 and 17," respectively, and I call especial attention to page 14 of the first mentioned exhibit and pages 9 and 12 of the second mentioned exhibit.

128 JAMES C. C. HOLDING, having been duly sworn, was examined and testified as follows:

By Mr. Wintersteen:

Q. What is your business?

A. Chief clerk, order department of the Midvale Steel and Ordnance Company.

Q. What was your business in 1916?

A. I was connected with the general sales department of the Carnegie Steel Company.

Q. How long have you been connected with Worth Brothers Company?

A. Since December 1, 1917.

Q. You were connected with the Worth Brothers Company before you came in contact with the Midvale Steel and Ordnance Company. Is that right?

A. No. I beg your pardon.

Q. What was your connection with the Worth Brothers Company? That is what I want.

A. I was never connected with the Worth Brothers Company during its existence before it was taken by—

Q. You are now connected with the Midvale Steel and Ordnance Company as I understand it?

A. Yes, I am.

Q. And have you had access to its records?

A. As far as the orders are concerned.

Q. As far as the orders are concerned?

A. Yes.

Q. Which were given to the Worth Brothers Company in 1916 and 1917?

A. Yes, sir.

Q. Do you know what was done with the discarded shell forgings manufactured by the Worth Brothers Company in 1916?

A. I knew some of them were sold to the Larkin Packer Company of Oklahoma.

129 Q. Before that did you know of anything that was sold to the Larkin Packer Company?

A. I did not.

Q. What is the Larkin Packer Company of Oklahoma?

A. They are dealers in oil well supplies.

Q. And will you tell me how many discarded shell forgings were sold to the Larkin Packer Company?

A. May I refer to the papers?

Q. Yes.

A. During 1917 there were orders received for 1053 discarded shell forgings, and during 1918, 3094.

Q. From that concern?

A. Yes.

Q. How many did you deliver?

A. During 1917 we delivered 1015 and during 1918 we delivered 3191.

Q. How many of those would you say manufactured in 1916 were delivered to that concern?

A. I am hardly in a position to answer that question.

Q. Coming up to the end of January 1, 1918. Did you have any discarded forgings of the 1916 models, so to speak, left on your hands?

A. Yes, sir.

Q. What did you do with them?

A. They were shipped to the Larkin Packer Company.

Q. Do I understand you to say since that time, since 1916, you have sold all of your discarded shell forgings, substantially all of them, to the Larkin Packer Company?

A. I should say so, yes, sir.

Q. What did the Larkin Packer Company do with those forgings when they got them?

A. As near as I am familiar with the uses to which they put that material, they manufactured them into drive shoes for oil well casing and couplings for casing.

130 Q. Let me see if I understand what that means. The oil wells are sunk with piping, are they not?

A. Yes.

Q. And they go down a good distance to the source of the oil in the sand? Is that right?

A. Yes, sir.

Q. And they have to have a pretty solid piping made of homogeneous, hard material?

A. Yes, sir.

Q. During the job?

A. Yes. That is correct.

Q. You have said to me that this material was used by the Larkin Packer Company for shoes for oil wells?

A. Yes, sir.

Q. Do I understand that these discarded shell forgings were used

as constituent parts of piping, either initially or by way of braces, which are used on the machines in sinking oil wells?

A. That is my understanding, yes, sir.

Q. I think I will not trouble you any further about that because you are not an engineer, but I will call an engineer to explain more particularly just how this use is had, and will turn you over to the assistant attorney-general for cross-examination at this stage.

#### Cross-examination.

By Mr. Frierson:

Q. At what price were these rejects sold?

A. In the neighborhood, I believe, of \$50 to \$55 a ton

Q. You sold them by the ton?

A. Yes, sir.

Q. At \$50 to \$55 a ton?

A. Yes, sir.

Q. That is about the price of scrap steel, is it not?

131 A. I cannot say as to that.

Q. Were any of them sold prior to 1917?

A. I think not. Our records show no orders received before 1917 from this concern.

Q. From any concern?

A. No, not as far as I know.

Q. The fact is that prior to 1917 there was no market at all for forgings in that shape except for munitions, was there?

A. I cannot answer that question, because my first experience with this class of material was obtained through orders received from the Larkin Packer Company.

Q. As a matter of fact, after a number of these had been rejected, then your company got busy, trying to find some place where they could be sold, and worked up a market for them to the extent of selling the ones they did sell, did they not?

A. I cannot say that that is the case. As I said, I am not connected with the sales department. My only knowledge comes through the orders which were received and placed on the books.

Q. And there were no orders for anything of that kind except for munition purposes until 1917?

A. As far as I know.

Q. The forgings that were sold to the Midvale Steel Company were sold at what price?

A. I don't know.

Q. You don't know what price?

A. No, sir.

Q. Were they sold by the ton, or by the forging?

A. I don't know that.

Q. There were a great many of those rejects that were simply scrap, were there not?

A. Possibly some.

Q. You don't know how many?

132 A. I am only familiar with what we got orders for from the Larkin Packer Company.

Q. You don't know how many rejects there were, or anything of that kind?

A. No, sir; I do not.

JOHN L. COX, heretofore sworn, recalled.

By Mr. Wintersteen:

Q. I think you can explain from an engineering standpoint all about this thing. What is the use of a discarded shell forging, according to your understanding, by such a concern as the Larkin Packer Company who, according to the evidence gave orders to Worth Brothers Company for a very considerable number of shell forgings?

A. As I understand it, the general use, the particular, special use in fact, of these discarded shell forgings was to make a driving shoe on the lower end of the casing of an oil well. It is customary in the west to start an oil well with about fifteen and one-half inch drill. That is sink something like four hundred feet until they strike a cave-in or water, when they put down a casing pipe about twelve and a half inches in diameter, the lower end of which carries a shoe to act probably as a cutting edge, and as a reinforcement for the thin metal of the casing pipe. The bottom is then drilled perhaps six hundred feet further with a smaller hole, and that naturally forms a shoulder between the holes. When they strike water or a cave-in they put down an inside casing about ten inches in diameter with a cylindrical shoe on the bottom, and so they go on reducing the diameter until they finally wind up with about a six-inch hole through which the oil or gas comes to the surface. Each section of pipe carries one of these shoes at its lower end.

133 Q. Then, do I understand that the function of these discarded shell forgings is as a homogeneous cylinder for bracing purposes for a pipe, or for cutting purposes at the end of the pipe or both?

A. It is both. It is more for a brace than anything else. After you sink a well part way of one diameter you have a smaller hole below it and there is a tendency then to crowd the pipe down into the smaller hole,—the casing pipe down into the smaller hole,—which is prevented by this high-grade ring, which reinforces the bottom of the casing pipe. The ring was made with a counter-bore, into which the pipe is pushed down. Below that, for a way, it is threaded. Here is a screw thread on a pipe (illustrating). Below that its bore is of a uniform diameter with the bore of the pipe. The shoe is chamfered off at the bottom so that the drilling tool coming up is naturally pushed over to the center, making altogether an arrangement like this (illustrating on paper).

Q. I think we understand that now without any sketch, Mr. Cox. It is the case of a cutting end, the end of a long pipe, or a shoe projecting the cutting end, which shoe must be made of very hard steel,

homogeneous steel. As an engineer, what is your judgment as to that use by the Larkin Packer Company and that use, testified by the Cameron Machine Company, being substantially commercial uses of this material?

A. Anything that is sold by the carload has what I call commercial use.

Q. It has been intimated here by the learned gentleman, in the nature of his cross-examination, that the price at which this material was sold to the Larkin Packer Company, or the Cameron Machine Company, was scrap price. Inherent in that question it would be thought that these were nothing but particular uses of scrap, of material that would have to be scrap, had it not been that somebody came along and bought it for their special uses.

What have you to say about that?

A. In a large factory, when there is no market for a by-product, it must be re-melted. As such, if it could not be sold, it would undoubtedly be re-melted, but when a use develops for it a discarded shell from a principal manufacturer becomes a subsidiary manufacture.

Q. What was the condition of the market in 1916 and 1917 for munitions, shells, projectiles, and the material entering into that application, as compared with the market of such concerns as the Cameron Machine Company and the Larkin Packer Company in size?

A. The market for munitions was, I should say, many hundreds of times that of the ordinary commercial manufacture.

Q. Therefore, the ordinary commercial market was comparatively the same?

A. Yes, sir.

Q. Addressing yourself to that situation, take the normal market, where the market is not glutted with discarded shells, discarded forgings, and a market exists for such products as the Cameron Machine Company and the Larkin Packer Company use, can material fabricated and developed into the form of Exhibit No. 5 be made commercially and sold to such concerns as the Larkin Packer Company and the Cameron Machine Company at a profit?

A. It depends altogether on what those concerns would pay for it, and it depends on the value of the material so produced as compared with similar material produced in some other way.

Q. Take the disappearance of munitions, take the dropping of the business of war, concerns going out of business of manufacturing shells, in your judgment is the market furnished by such concerns as the Larkin Packer Company and the Cameron Machine Company a practical market?

A. Entirely so, however to a limited extent only for anybody who equipped to make the material. Then, in times of peace, commercially it would be produced more cheaply than this material was produced to fill the French specifications. To illustrate, under the French specifications it was necessary to discard about 32 per cent scrap in order to avoid any possibility of there being a piping. Commercially, for such uses as the Larkin Packer Company or the

Cameron Machine Company make of them, that would make no difference, and instead of cutting off 32 per cent for scrap, the probabilities are that they would not cut off over 12. In fact, it probably would not be as much as that. It probably would be about ten. There would be no rejections in the manufacture.

Q. Then, am I correct in understanding that if any of this material were to be sold at anything like scrap value, it would be because of the overwhelming mass of material that was produced and discarded and sold?

A. Yes.

Q. Do you know of any other practicable use or commercial use of discarded shell forgings except these two operations?

A. Not specifically, but in any case where solid drawn tubing is used in short lengths, and is of sizes produced for the shells, there should be a possible application.

Q. Do you know whether this material was worth anything, practically, commercially, as gas containers, compound oxygen cylinders?

A. The chemical composition of the steel is, as far as I know, identical with that required by the Interstate Commerce Commission. The same carbon limits, exactly, are the figures required by the Interstate Commerce Commission, as were necessary in 136 the shells called for in the French specifications. During the active progress of the war we were approached—I had forgotten this—by at least one concern with the idea of securing these discarded shell forgings, shell bodies,—the idea was to make them into carbonic acid tanks for fluid or compressed carbonic acid.

Q. Who are the largest manufacturers of gas containers in this country?

A. I think the National Tube Company, without a doubt.

Q. Do you know Wright Tyndel and Company?

A. No, I know a concern named the Tyndel, Morris Company.

Q. Yes. What do they manufacture?

A. Their principal business is the making of crank shafts and gas containers.

Q. Do you know whether or not the product that they make is or is not essentially developed from just such things as these shell forgings?

A. I know that they are developed from such forgings because I have seen them made there.

Q. Would you say, therefore, that Plaintiff's Exhibit No. 5 has a distinct and commercial use, a practical use in the market, or a distinct commercial use other than for shell forgings?

A. Undoubtedly.

#### Cross-examination.

By Mr. Frierson:

Q. Was that true in 1916?

A. Yes, just as true.

Q. What concerns were using anything of that kind in 1916?

A. What concerns were?

Q. Yes.

A. That is a question I could not answer you. The need existed in 1916, just as it does in 1918. The need existed in 1916 just as it does now in 1918.

137 Q. Is not this all you mean to say, that it was a thing that could have been adapted to uses and has since been adapted to some uses, but was not at that time? Do you know of a thing of that kind being used for any purpose except munitions in 1916?

A. You would have to define what you mean by "a thing of that kind." Gas tanks in 1916 were made just as gas tanks are made today. The difference between these shells and gas tanks is that a container or gas tank is drawn with thinner walls. There was no other essential difference. There is also a slight difference in the inside shape. There was no essential difference between these discarded shell forgings and a gas tank.

Q. In 1916 you knew of no use that was being made of rejected shell forgings except scrap, did you not?

A. There were so few made in 1916, within my ken, that I know nothing about it.

Q. What is that?

A. I say there were so few discarded shell forgings made within the purview of my information in 1916 that I do not know of any market for them.

Q. You do not know to-day that there was any market for them in 1916, do you?

A. I should say, no, to-day, because I am not informed on the market. I am not a salesman, you know.

Q. And the market that has been developed since, the limited market that has been referred to here, is at a price far below the cost of the forging, is it not?

A. Far below the cost of the forging as governed by the French inspection. You have got no comparison of the cost or the market price as compared with what would be done in the ordinary commercial world.

Q. It is far below the actual cost of those that you have known to be sold for that purpose, is it not?

138 A. There again you must define what you mean by "actual cost." If you mean the cost to manufacture the shells on that order and count in the rejections as a credit, then the price at which those discarded shells were sold was not less than the cost of manufacturing the forging. But if you charge yourself with the rejections then it would be far below the cost of manufacture, because the manufacturer would have considered nothing except the total steel he sold.

Q. As a matter of fact, these forgings were sold by Worth Brothers to the Midvale Steel Company at prices ranging from \$28.20 a forging to \$67.50 a forging, according to the size.

A. I do not know the prices.

Mr. Wintersteen: That is right.

Mr. Frierson: I read that from the statement that has been introduced here.

By Mr. Frierson:

Q. Now, the larger forgings, which were sold at \$67.50,—it would take about three of them, or nearly three of them, to make a ton, would it not?

A. Yes, sir.

Q. And, therefore, if a ton of them was sold for \$50 or \$55 or \$60, it would be very much less than the cost of production, would it not?

A. It would be very much less than the price at which the Midvale Company bought them.

Q. They are reported in this statement to have been made at a cost of \$48 a forging.

A. Then, it would be far less than the cost of production.

Q. What is that?

A. Then, they would be sold for less than the cost of production.

Q. Very much less.

A. They would be sold for decidedly less.

### 139 Redirect examination.

By Mr. Wintersteen:

Q. Why were they sold at less than the cost of production?

A. Because you could get a better credit for them than you could by putting them into scrap.

Q. Take the normal condition in peace times, where a normal market existed for shells, when the world was not flooded with shells, and the demand for shells was not so great, and a normal developing market, according to the evidence here, for general commercial uses; could those shell forgings, such as instanced by Exhibit No. 5 be made and sold to general people, for commercial purposes at a profit?

A. I think they could, because I think that they are sufficiently desirable for the user to be willing to pay proper prices.

Q. You got large prices for units of shells because the Government needed those shells?

A. Certainly.

Q. And paid for them?

A. It is a question of supply and demand.

Q. They were fabricated especially, upon careful specifications, which would not be necessary for commercial purposes. Is that correct?

A. Yes, that is true.

Q. Was there any other use, or were there any other uses that you know of, other than the uses you have mentioned, namely, the use by such a concern as the Cameron Machine Company and such a concern as the Larkin Packer Company and the concern using them for gas or oxygen cylinders,—are there any other uses you have in mind? I am going to ask you whether there is any use for these discarded shell forgings for the Liberty Motors?

140 A. Not of the sizes here produced. The Liberty Motor, I think, has a bore of somewhere between four and five inches. These shells were too large. The motors are made by very much the same method.

Recross-examination.

By Mr. Frierson:

Q. If I understand you, there was no demand for these things in 1916, except at prices very much below the cost of production, but that you think, maybe some time in the future, if the price of production gets low enough, it may be possible to sell them for other uses? That is substantially true, is it not?

A. No, I should not say so.

Q. How much of it is not right?

A. Two things make a bargain. One, the desire of a man to buy. The other is your willingness to sell.

Q. Up to date, there has been no market except at prices very much below the cost of production, has there?

A. The cost of production as produced.

Q. I mean the actual cost of production of these shells.

A. But not necessarily the cost at which they can be produced, and will be produced in times of peace.

Q. Therefore, I say, up to date, it has been impossible to fix a market for them aside from munitions, except at prices very much below the cost or the actual cost of production?

A. That is correct.

Q. You think that, perhaps, in the future, because the cost of production may be reduced, that it may be possible to sell them at a profit?

A. The cost of production will be enormously decreased, and the purchaser may pay more.

Q. You think it will be so?

A. Yes.

141 Q. But it has not been up to date?

A. No, because the market has been filled by rejections.

By Mr. Wintersteen:

Q. What was the price of scrap in 1916?

A. That is a question I cannot answer absolutely, but I should say in general maybe it would be worth about \$33 a ton.

Q. Then, these prices were not scrap prices?

A. Oh, no. By no means.

Q. Higher?

A. Very nearly double.

By Mr. Frierson:

Q. As a matter of fact, the price of scrap steel has been from \$40 to \$50 a ton?

A. It depends altogether on the year.

Q. Take the last two or three years, 1916 and 1917.

A. We credited our scrap at half a cent a pound, which would be \$11 a ton. We bought it, perhaps, at \$33.

Q. Since 1915 scrap steel has been selling as high as from \$40 to \$50 a ton, has it not?

A. I don't know.

Q. You don't know just what it has been?

A. I do not know that it sold as high as from \$40 to \$50 a ton.

Q. Do you know what it has been selling for?

A. I know it has been sold in the neighborhood of \$33 a ton, because we bought it. In 1915 or 1916.

Mr. Wintersteen: I rest at this point, if the Court please.

Mr. Frierson: So do we. We rest here, too. We submit the case on the evidence as introduced.

(Plaintiff closes.)

(The defendant offered no evidence.)

(Testimony closed.)

(Filed Feb. 28, 1918.)

THOMPSON, J.:

A trial was had in this case by the Court without a jury under a stipulation of the parties. The plaintiff, Worth Brothers Company, brought suit against the defendant, the Collector of Internal Revenue for the First District of Pennsylvania, to recover taxes paid under protest, amounting to \$74,857.70, with interest from July 25, 1912 and levied and assessed against the plaintiff and collected under the provisions of Section 301 of Title III of the Act of September 4, 1916. The Section under which the tax was imposed is as follows:

"See, 301. (1) That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e); shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profit actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States. Provided however, That no person shall pay such tax upon net profit derived during the year nineteen hundred and sixteen derived from the sale and delivery of the articles enumerated in this section under contracts executed and fully performed by such persons prior to January first, nineteen hundred and sixteen."

The plaintiff is a corporation of Pennsylvania engaged at Conemaugh in the manufacture of iron and steel. The Milvall Steel Company entered into a contract with the French Government to manufacture and sell to it a large quantity of high explosive shells of four sizes,—220 millimeter, 270 millimeter, 300 millimeter and 330 millimeter. The type of explosive shells contracted for by the French Government is a composite structure consisting of the following distinct parts:

1. The shell shell body in one piece, cylindrical in shape, rounded at the top so that with the nose base it comes to a point with what is called the ogival head.
2. A copper driving band set into an annular groove near the base of the shell body and projecting slightly beyond it to engage bands or rifling in the bore of the gun.
3. A nose timing fuse which is a highly complicated article of mechanism which is screwed into the throat of the shell body.
4. A high explosive charge to be contained in the shell body.

The shell as a whole is a very carefully manufactured and highly finished piece of mechanism, the parts of which must be adjusted to each other with the greatest accuracy and care. The steel of which the shell body is composed must be within such limits of tensile strength as to withstand the shock of fire, but so long as the charge content is exploded, its weight when fractured must be within certain tolerances, exact, its exterior and interior must be absolutely uniform at time to the longitudinal axis of the shell. The thickness and weight of the material must be so distributed as to have the such uniformity of balance as to give uniformity and stability now in flight. Beginning with the steel ingot which are the first flame in which, under the contract with the French Government, its inspectors passed upon the material as it progressed toward completion, its manufacture comprised thirty-four steps. The Milvall Steel Company ordered from the plaintiff steel forgings which represented the fifth step in the manufacture subject to French governmental inspection and the plaintiff manufactured the shell forgings at its plant at Conemaugh.

The arc in controversy was levied and collected from the plaintiff upon the profile in the sale of the manufactured shell forgings upon the claim that the profile accrued in the manufacture of parts of shells.

The plaintiff's plant consisted of blast furnaces, an open hearth and plant, steel plate mills, a blooming mill, at which were produced iron, steel ingots, plates for all purposes, steel beams, forge beams, bars, slabs, tubes and shell forgings. The main production of the plant was steel plates.

Under the order of the Milvall Steel Company the shell forgings to controversy were to be manufactured according to the specifications of the French Government which were part of its contract with the Milvall Steel Company. In order to supply the plaintiff's plant

for the work, it was necessary to, and the plaintiff did, install special machinery adapted for forgings of the character required at a cost of about \$2,000,000. The stages of the work done by the plaintiff were as follows:

(1.) Smelting the ore in the blast furnace into pig iron without, however, running it into the moulds which would form what are commercially known as pigs.

(2.) In its molten state transferring it with a ladle into an open hearth furnace where it was converted into steel and tapped 145 out of the furnace and conveyed into moulds in the form of ingots.

(3.) Heating the steel ingot to the proper temperature for rolling when it was rolled in the blooming mill into rounds or blooms.

(4.) The rounds or blooms were then cut with a hot saw into billets of sufficient length, diameter and weight to produce the required shell forging. At this point the French inspectors inspected each individual billet to determine whether there were defects in the steel such as piping or blow holes. After acceptance of the billets so tested, they were chipped to determine whether surface defects existed. At this stage the steel billet, which was the material which was to become the shell forging, is cylindrical in shape, of approximately two-thirds of the outside diameter of the shell forging to be produced and approximately one-third of its length.

(5.) The billet was then taken to the forge shop, heated from two to three hours in a continuous furnace, and placed in the container or die of a hydraulic piercing press. It was pierced while hot by a piercing bar entering one end and pushing its way to within sufficient distance of the other end to leave a closed end or base. During this process the metal being heated to about 2100 degrees is viscous so that the metal is pushed up to the sides of the die or container. The product of this process was a cylindrical forging, hollow, with one closed and one open end.

(6.) The forging was then taken to a horizontal hydraulic bench and drawn while the metal was hot, so as to increase its length and conform its inside and outside diameter to the required size of the forging ordered by the Midvale Steel Company.

The product of manufacture by the plaintiff was a rough, 146 steel forging, cylindrical in shape, hollow, having one closed end. In order to fit it for delivery to the French Government it was necessary for it to go through a large number of heating, forging and machining processes before it became a finished, completed shell body. These processes were carried on after delivery to the Midvale Steel Company at its plant and were twenty-nine in number. Without going into detail as to each process, they were as follows:

(1) Slicing excess length off the open end.

- (2) Centering over a mandrel by the inside surface and drilling a hole in the base for working upon a lathe.
- (3) Rough-machining the outside approximately concentric with the bore.
- (4) Finish-boring in a boring lathe to make the inside concentric with the outside.
- (5) Re-centering the base in order to take the next step of,
- (6) Finish-turning to bring the inside and outside surfaces concentric.
- (7) Cutting or facing the base or outside of the closed end to bring it to the proper thickness.
- (8) Slicing the excess length off the open end to make the forging accurate in length.
- (9) Hand-grinding off any roughness left on boring or turning the interior.
- (10) A very important step in bringing the upper end of the cylindrical forging to the pointed form of a shell body. This step is known as nosing. It consisted in heating the shell in a furnace having circular doors for a proper distance back from the open end and then placing it in a forging press with a conical or ogival shaped die, so that it assumed the contour of a gothic arch at the top. This forging process while the metal was hot caused the pressing in of the metal so as to produce a graduated thickness increasing as the diameter of the pointed end increased.  
147      (11) Annealing, which consists in heating and slowly cooling the metal, making it soft and tough.
- (12) Sand-blasting the exterior of the shell to remove the scale produced by the former heating process.
- (13) Heating above the "critical temperature" and quenching the heat in a volume of water for the purpose of hardening the metal.
- (14) Heating in a gas furnace to remove the excess brittleness associated with the hardness, the object being to give the shell the proper degree of toughness and hardness to enable it to withstand the impact of the discharge in the gun and to be shattered by the force of the high explosive content upon reaching its objective point.
- (15) Testing for hardness of the metal by a Brindell testing machine. This test is to determine uniformity of hardness of the metal of the shell.
- (16) Sand-blasting inside and outside to get off the rough scale of the heat treatment.
- (17) Cutting or facing off in length at the nose to its assigned length, and boring and threading the throat or aperture in the open

end of the shell. The threading is for the purpose of screwing into place the fuse and a shoulder is left in the interior for a gas check seat. The thread is cut above the seat.

(18) Cutting the threads accurately by means of a hand tap or cutter.

(19) Placing the shell on two horizontal machine-ground bars of steel and rolling it along to determine through counter-acting weights on the interior the balance of the shell, and, if the weight is found to be properly distributed, re-centering the base to correspond. This step is necessary in order to procure accurate flight of the shell.

(20) After re-centering, re-turning the shell so as to bring it to accurate cylindrical shape.

148 (21) The shell having been balanced up and returned, turning the cylindrical body to finished size.

(22) Turning the ogival head to its finished size.

(23) Grinding the bourrelet. The French shell is made with a diameter at the rear of the head which is slightly larger than the body back of it and that maximum diameter is called the bourrelet. Its diameter is made to fit the top of the lands or ribs of the rifling of the gun. This maximum diameter at the head, corresponding with that of the projecting copper band encircling the shell body near its base, causes the projectile to fit the lands and gives the remainder of the body of the shell a clearance, avoiding friction.

(24) Cutting the band seat. This is an inset groove cut around the body of the shell near its base into which the copper band is hammered.

(25) Facing the base to the length which will give the final weight that the shell must have.

(26) Boring the throat, below the shoulder which had been left therein, to remove any roughness.

(27) Subjecting the shell to interior hydrostatic pressure (1) to determine whether there is any leak in the base which would permit the gas from the powder, when it is discharged, finding its way into the cavity of the shell and prematurely bursting it; (2) to determine whether there are any cracks due to the heat treatment; (3) to determine whether the steel is of the necessary tensile strength to withstand the shock of fire.

(28) Giving the shell a bath of oakite to prevent rusting.

(29) Testing in a sound-proof room to determine by the ring whether it is cracked.

The remaining processes have to do with fitting the copper band upon the shell.

149 It has been thought necessary to recite in detail the various steps required in the manufacture of the finished shell body in order to fully demonstrate the difference in physical characteristics and fabrication between the rough steel forging delivered to the Midvale Steel Company and the finished shell body when ready for delivery to the French Government.

In the rough steel forging was contained all of the material that was finally contained in the completed shell body without the copper band, but a large part of the exterior and interior metal was removed by machining to make it conform in size, weight and finish to specifications for the completed product. In case of 220 millimeter shells, for example, the forgings delivered by the plaintiff were approximately in outside diameter 9 $\frac{3}{8}$ ", inside diameter 7", length 32 $\frac{3}{4}$ ", weight 351 pounds. The 220 millimeter shells, after fabrication had been completed by the Midvale Steel Company were approximately of the following dimensions and weight; outside diameter 8.60", inside diameter 7.36", length 29.53", weight 160 pounds.

The forgings had to be subjected to processes of cutting to proper length, lathing and boring to proper inside and outside diameter, forging to produce the ogival head, annealing, hardening, machining to proper contour, machining and hand-finishing the threads, shoulder and throat, finishing by sand-blasting and other processes to render the surface smooth and clear of scale and roughness. Measured in dollars the plaintiff did about 40% and the Midvale Steel Company about 60% of the work on the shell bodies supplied to the French Government by the Midvale Steel Company.

After leaving the plaintiff's plant, the metal was increased in tensile strength from 85,000 pounds to a minimum of 113,780 pounds.

150 The question is whether the manufacturing done by the plaintiff brings it within the terms of Section 301 of the Title, under which the tax was assessed and collected, which provides:

"(1) That every person manufacturing \* \* \* (c) \* \* \* shells \* \* \* of any kind \* \* \* loaded or unloaded \* \* \* or (f) any part of the articles mentioned in \* \* \* (c) \* \* \* shall pay for each taxable year \* \* \* an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

In view of the physical changes through the application of labor, skill and science in manufacturing necessary to develop the shell forging into the finished shell body, it cannot be contended that the shell forging delivered to the Midvale Steel Company was a "part" of a shell in the sense of being adapted and ready for assembling with other parts to make a complete shell. It could not be used as a shell body until it underwent at least a large part of the steps of manufacture which the Midvale Steel Company put upon it. If "manufacturing" is used in the sense of completing manufacture,

the plaintiff was not manufacturing shell bodies which were at the completion of its work parts of shells.

It should be borne in mind, however, that the tax is laid, not as a tax upon the shell or any part of the shell, but is laid as an excise tax upon the business or occupation of manufacturing shells or any parts of shells, the amount of the tax to be measured by the entire net profits received from the sale of such articles manufactured in the conduct of that business or occupation. That was the construction put upon Section 27 of the War Revenue Act of 1898, imposing a tax upon persons carrying on the business of refining

sugar equivalent to  $\frac{1}{2}$  of 1% on the gross amount of their  
151 receipts in excess of \$250,000, in the case of Spreele Sugar

Refining Company v. McClain, 192 U. S. 397, at page 411. As the tax is laid upon the business or occupation of manufacturing the inquiry therefore is whether "any person manufacturing" includes only such persons manufacturing as bring the article manufactured to the finished condition where it is adapted for use as a part of a shell, or whether the term includes any person manufacturing the article in any one or more of the successive steps substantially necessary to bring it to that condition. If the former construction is to prevail, at which of the steps does the manufacture begin? If it is held that it does not begin until the manufacturer who brings it to its finished state commences his work, it would follow that if the process of manufacture were distributed among a number of manufacturers, each doing a part of the manufacturing, the payment of the tax would be confined to that manufacturer who contributed such final steps as would bring the article to its completed state of adaptability to the purpose intended. I do not think the language of the Section justifies an interpretation which would lead to nullifying its purpose, or would lead to a different measure of liability for the tax assessed against different manufacturers or against the same manufacturer of different lots of shells, dependent upon what part of the prior stages of manufacture might be done under contract or otherwise by others.

I think the language of the Act is broad enough to clearly show that Congress intended to impose an excise tax upon the occupation or business of manufacturing in all or any of its stages from the first step to the last of the manufacture which produces the shell or any part of it from the raw material composing it to its completed state, but that manufacturing must be held to have begun only when the material as such had been so changed by manufacture as to

152 exhibit its intended use in, and application exclusively to, the manufacture of the final product.

In the present case ore was material for making pig iron; pig iron, for making open hearth steel ingots; ingots, for making blooms or rounds; and blooms or rounds, for making billets; and the billets continued to be material so far as manufacturing shell bodies was concerned while in the form of billets. Each of these steps was a manufacturing one, but the manufactured article had not yet been adapted and applied to its final use for a shell body.

It is true that, under the Midvale Steel Company's contract, the

specifications of which were to be adhered to by the plaintiff, the chemical composition of the steel was prescribed and it was subject to the inspection of the representatives of the French Government. There is nothing in the case, however, to show that the ingots, the blooms or rounds, or the billets were not of such composition as to be used generally in the trade for other purposes. When, however, in the next step the heated billet was forged by the piercing process, it became a hollow forging closed at its base and open at its top and destined to become a shell body. There was further progress towards that destination in the next step of manufacture when the pierced forging was drawn into a shell forging. The article then manufactured was peculiarly adapted and exclusively intended by further manufacture to become a shell body and had no other use to which it was peculiarly adapted. It is true there was evidence to show that such of the forgings as were rejected were sold by the plaintiff and other manufacturers to be used for other purposes. The plaintiff sold some to the Cameron Machine Company, which built machines for slitting paper and fabric from wide weaves into narrow strips. In its manufactured machines it uses a steel cylinder against which a cutter runs, and it purchased the rejected steel forgings by the ton at scrap steel prices, cut them into cross-sections, making rings ranging from 8" to 14" in breadth and machined them inside and out, to adapt them to the purposes of their machines. Sales of the rejected forgings at scrap prices were also made to the Larkin Packer Company of Oklahoma, the closed ends cut off, and the forgings manufactured into drive shoes for oil well casings and couplings for castings. There was also evidence tending to show that the forgings might be converted into gas containers, but no evidence of actual sales or use for that purpose. It appeared, however, in the use for cylinders for cutting machines and the use for drive shoes and couplings for oil well casings, the features which adapted the forgings to those purposes were the qualities of the steel and the hollow cylindrical form of the shell forgings which permitted them to be cut into suitable lengths, but that one essential feature of the forgings, the closed end, was entirely superfluous to the purpose for which the purchasers used the forgings. It is apparent, therefore, that the use to which the rejected forgings were put was one to which they could be fitted, but to which as a whole they were not peculiarly adapted in their manufactured state, and it is apparent that they were not sold by the ton as scrap metal at a profit as a manufactured article. With the piercing process, then, commenced the application of what had been a steel billet to the special use and purpose of producing a shell body. The plaintiff then became engaged in manufacturing shell bodies, and when its part in the manufacturing was completed, it sold to the Bidvale Steel Company partially manufactured shell bodies.

In view of the purpose of Congress to tax the business of manufacturing and to include within the scope of such business all manufacturing regardless of whether the manufacturer was engaged in carrying the manufacture to completion or through some of

154 its stages, the profits received "from the sale or disposition of such articles manufactured" is held to include profits from the sale or disposition of those partially, as well as those completely, manufactured. If the tax were laid upon the manufactured article as it is, for example, under Title IV, Chapter Eight F, Section 6309 $\frac{3}{4}a$ , et seq., Compiled Statutes, 1918, Compact Edition, or were laid upon an article as custom duties are charged upon commodities upon their being imported into the United States, the conclusion would no doubt be, as contended for the plaintiff, that only the manufacturer selling the finished article would be liable for the tax. That rule has been settled beyond dispute by the multitude of decisions cited on behalf of the plaintiff, where the courts have ruled that a manufactured article does not become such until its manufacture is complete, that is, it must be so changed from the material of which it is composed by the application of labor, skill and science as to be put into a form that is suitable for use and adapted with a design to be used as such article. The rule has been applied in the classification of articles of merchandise imported and subject to customs duties or upon which drawback is allowed. There are decisions as to what constitutes a manufactured article, what constitutes a part of a manufactured article, what constitutes a partially manufactured article, what constitutes a manufacture of certain material and what constitutes a wholly manufactured article dependent upon the terms of the law under which a tax is laid upon the article itself, or under which a drawback or other privilege is allowed.

I cannot perceive that these cases have any bearing upon the question arising in this case unless the terms of the Act imply that the tax is to be imposed only upon the business of manufacturing to completion shells or parts of shells, and there is no such limitation in its terms. The clear purpose of the Act is through taxation of the business or occupation of manufacturing munitions of war to reach the profits of all those engaged in such manufacture whether engaged in manufacturing to completion or engaged in any part of such manufacturing.

155 The plaintiff was therefore a person within the terms of the Act manufacturing parts of shells and was liable to payment of the tax.

It is with some reluctance that the conclusions herein set forth have been reached in view of the contrary ruling of Judge Thomson of the Western District in his charge to the jury in a recent case. However, after very careful consideration of the questions involved and with due deference to the opinion of so learned and careful a Judge, I am forced to the opposite conclusion.

*Rulings Upon Plaintiff's Requests for Findings of Fact.*

1. The several facts in detail contained in the stipulation of Agreed Upon Facts.

This stipulation is filed of record and it is so found.

2. That the forgings manufactured by the plaintiff at the stage of their development when delivered to The Midvale Steel Company by the plaintiff, were marketable otherwise than for finishing as shells and, as matter of fact, large numbers of rejected forgings were sold by the plaintiff to Larkin Packer Company, of Oklahoma, for development by the latter into shoes for gas wells; and these forgings were also marketable for use in the manufacture of slitting and rebinding machines, and many of a similar fabrication were actually bought by the Cameron Machine Company, of Brooklyn, from other manufacturers, and effectively used in the manufacture by said Company of such slitting and rebinding machines.

156 It is so found in connection with findings heretofore stated and discussed.

3. The processes through which the material went after leaving the plaintiff's hands, before being finished for practical use, were twenty-nine in number.

It is so found in connection with the findings heretofore stated and discussed.

*Rulings Upon Plaintiff's Requests for Conclusions of Law.*

1. That the forgings, the net profits from the manufacture of which are involved in this suit, were not any of the articles, or parts of the articles, made taxable by Section 301 of Title III of the Act of Congress of September 8th, 1916, commonly known as the Munitions Manufacturers' Tax Act.

This request is declined.

2. That the plaintiff is entitled to a finding that there is due from the defendant to it the amount of its claim, \$74,857.07, with interest from July 25th, 1917. See, on the question of interest, Klock Produce Co. v. Hartson, Collector, 212 Fed. Rep. 758; State Line & S. R. Co. v. Davis, 228 Fed. Rep. 246; Home v. Parrish, 229 U. S. 494, 497.

This request is declined.

*Rulings Upon Defendant's Requests for Findings of Fact.*

1. During the taxable year 1916 the Midvale Steel Company was under contract to sell and deliver to the French Government 394,000 high explosive shells of four different sizes to be manufactured according to specifications which were made a part of the contract.

It is so found.

2. The product thus contracted for consisted of two pieces: (1) a shell forged or drawn from steel and finished by the necessary 157 machining and finishing process, and (2) a copper band fitted around the shell for the purpose of guiding it through the rifling of the gun. But the Midvale Steel Company did not undertake to furnish the fuses and explosives which were to be thereafter put in the shells. In other words, the contract called for unloaded shells.

It is so found.

3. It was provided by the contract that the French Government should "have the right of having one or more inspectors at each of the factories where the shells hereby contracted for and their component parts are being manufactured for the purpose of observing the manufacture thereof and of testing the same at any time before delivery."

It is so found.

4. The specifications made a part of the contract include specifications as to the composition and manufacture of the steel to be used, the forging or drawing of the shell from the steel, the machining and finishing of the shell, and the making and fitting of the copper band.

It is so found.

5. In the manufacture of some of the shells the Midvale Steel Company did all the work, beginning with the manufacture of the steel. But as to others it contracted with the plaintiff to furnish the material, manufacture the steel and forge and draw the shells. This was done according to the specifications above referred to and under inspection of the French Government. When the shells were thus forged and drawn, they were delivered by the plaintiff to the Midvale Steel Company, and that company did all necessary machining and finishing on them and fitted the copper bands around them, and thus further proceeded with and completed the manufacture of the product contracted for.

It is so found.

158 6. The actual cost of the work done by plaintiff was about 40 per cent of the cost of all the work done on the shells, and the cost of the work done by the Midvale Steel Company was about 60 per cent.

It is so found.

7. The plaintiff's profit, during the taxable year 1916, on the materials furnished and the work done by it as aforesaid was \$598,856.52.

It is so found.

8. The unloaded shell delivered by the Midvale Steel Company to the French Government was the forged or drawn shell delivered to the former by the plaintiff after being subjected to the necessary machining and finishing processes and having a copper band fitted around it.

It is so found.

9. In order to make these forgings, the plaintiff had to provide special machinery at a cost of about \$2,000,000.

It is so found.

10. The forgings themselves as delivered by the plaintiff were specially designed and manufactured to be, when properly machined and finished, used as parts of completed shells. They were not adapted for any other practical use and were not such articles or commodities as are kept in stock and held for sale commercially.

It is so found.

11. During the year 1916 there were a great many companies in the United States engaged in doing some part of the work necessary to the manufacture of shells but not more than two or three, if that many, which began with the steel and did all the work necessary to complete the shell.

It is so found.

159 12. The plaintiff and the Midvale Steel Company are both owned and controlled by the Midvale Steel and Ordnance Company, a holding corporation.

It is so found.

*Rulings Upon Defendant's Requests for Conclusions of Law.*

1. The plaintiff was a person manufacturing explosive shells or part of such shells and the tax paid and now sought to be recovered was properly collected.

It is so found.

2. The plaintiff was a person manufacturing parts of shells, and the tax paid and now sought to be recovered was properly collected.

It is so found.

3. The plaintiff was a person manufacturing shells and the tax paid and now sought to be recovered was properly collected.

Under the undisputed facts in this case, this finding is immaterial and is denied, except as to the conclusion that the tax paid and now sought to be recovered was properly collected.

Judgment may be entered for the defendant.

*Præcipe for Judgment.*

(Filed March 11, 1919.)

SIR:

Please enter judgment in favor of the defendant in the above case.

(Sgd.)

ROBERT J. STERRETT,  
Assistant U. S. Attorney.

To the Clerk U. S. D. C., E. D. of Pa.

160

*Judgment.*

(Filed March 11, 1919.)

Before Thompson, J.

And Now, March 11, 1919, it is Ordered that judgment in the above entitled cause be entered in favor of defendant and against plaintiff.

By the Court.

Attest:

(Sgd.)

E. G. JOHNSON,  
Deputy Clerk.*Exceptions of Plaintiff to Trial Judge's Rulings and Action.*

(Filed March 26, 1919.)

And Now, March 25th, 1919, comes the plaintiff, by its attorney, and excepts to sundry rulings and actions of the trial Judge, as follows:

First Exception: To ruling upon plaintiff's first request for conclusion of law.

Plaintiff's First Request.

"That the forgings, the net profits from the manufacture of which are involved in this suit, were not any of the articles, or parts of the articles, made taxable by Section 301 of Title III of the Act of Congress of September 8th, 1918, commonly known as the Munitions Manufacturers' Tax Act."

Ruling thereupon: "This request is declined."

Second Exception: To ruling upon plaintiff's second request for conclusion of law.

Plaintiff's Second Request.

"That the plaintiff is entitled to a finding that there is due from the defendant to it the amount of its claim, \$74,857.07, with interest from July 25th, 1917. See, on the question of interest, Klock Produce Co. v. Hartson, Collector, 212 Fed. Rep. 758; State Line & S. R. Co. v. Davis, 228 Fed. Rep. 246; Home v. Parrish, 229 U. S. 494, 497."

Ruling thereupon: "This request is declined."

Third Exception: To ruling upon defendant's first request for conclusion of law.

## Defendant's First Request.

"The plaintiff was a person manufacturing explosive shells or part of such shells and the tax paid and now sought to be recovered was properly collected."

Ruling thereupon: "It is so found."

Fourth Exception: To ruling upon defendant's second request for conclusion of law.

## Defendant's Second Request.

"The plaintiff was a person manufacturing parts of shells, and the tax paid and now sought to be recovered was properly collected."

Ruling thereupon: "It is so found."

Fifth Exception: To ruling upon defendant's tenth request for findings of fact.

## Defendant's Tenth Request.

"The forgings themselves as delivered by the plaintiff were specially designed and manufactured to be, when properly machined and finished, used as parts of completed shells. They were not adapted for any other practical use and were not such articles or commodities as are kept in stock and held for sale commercially."

Ruling thereupon: "It is so found."

Sixth Exception: To ruling of the trial Judge directing judgment for the defendant.

162 Ruling of Judge: "Judgment may be entered for the defendant."  
(Sgd.)

A. H. WINTERSTEEN,  
*Attorney for Plaintiff.*

March 26, 1919.  
Exceptions allowed.

(Sgd.)

J. W. THOMPSON, J.

*Petition for Writ of Error.*

(Filed April 3, 1919.)

To the Honorable the Judges of the District Court for the Eastern District of Pennsylvania:

Worth Brothers Company, the above-named plaintiff, conceiving itself to be aggrieved by the judgment entered on the 8th day of March, 1919, hereby prays for a writ of error therefrom, for the rea-

sons specified in the Assignment of Errors filed herewith, and further prays that said writ be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was entered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit.

(Sgd.)

A. H. WINTERSTEEN,  
*Attorney for Plaintiff.*

Dated April 3, 1919.

*Order Allowing Writ of Error.*

(Filed April 3, 1919.)

And Now, this 3d day of April, 1919, it is ordered that the foregoing Writ of Error be allowed as prayed.

(Sgd.)

J. W. THOMPSON, J.

*Assignment of Errors.*

(Filed April 3, 1919.)

And Now comes Worth Brothers Company, plaintiff in error and plaintiff below, and, having prayed a writ of error from the judgment entered in favor of the defendant on the 11th day of March, 1919, says that in said judgment and in the record of the proceedings in the cause there are manifest errors, which are assigned as follows:

1. The court below erred in declining the plaintiff's first request for conclusion of law, which request was as follows:

"That the forgings, the net profits from the manufacture of which are involved in this suit, were not any of the articles, or parts of the articles, made taxable by Section 301 of Title III of the Act of Congress of September 8th, 1918, commonly known as the Munitions Manufacturers' Tax Act."

Court's action thereupon: "This request is declined."

2. The court below erred in declining the plaintiff's second request for conclusion of law, which request was as follows:

"That the plaintiff is entitled to a finding that there is due from the defendant to it the amount of its claim, \$74,857.07, with interest from July 25th, 1917. See, on question of interest, Klock Produce Co. v. Harston, Collector, 212 Fed. Rep. 758; State Line & S. R. Co. v. Davis, 228 Fed. Rep. 246; Home v. Parrish, 229 U. S. 494, 497."

Court's action thereupon: "This request is declined."

3. The court below erred in its ruling upon defendant's first request for conclusion of law, which request was as follows:

164      "The plaintiff was a person manufacturing explosive shells or part of such shells and the tax paid and now sought to be recovered was properly collected."

Court's ruling thereupon: "It is so found."

4. The court below erred in its ruling upon defendant's second request for conclusion of law, which request was as follows:

"The plaintiff was a person manufacturing parts of shells, and the tax paid and now sought to be recovered was properly collected."

Court's ruling thereupon: "It is so found."

5. The court below erred in its ruling upon defendant's tenth request for findings of fact, which request was as follows:

"The forgings themselves as delivered by the plaintiff were specially designed and manufactured to be, when properly machined and finished, used as parts of completed shells. They were not adapted for any other practical use and were not such articles or commodities as are kept in stock and held for sale commercially."

Court's action thereupon: "It is so found."

6. The court below erred in directing that judgment be entered for the defendant.

7. The court below erred in not directing that judgment be entered for the plaintiff for the amount of its claim, to wit, \$74,857.07, with interest from July 25th, 1917.

(Sgd.)

A. H. WINTERSTEEN,  
Attorney for Plaintiff.

*Stipulation Sur Transcript of Record.*

(Filed April 4, 1919.)

It is hereby stipulated by and between Counsel for the respective parties that the Transcript of Record sur Writ of Error, in the above entitled case, shall include the following papers:

Docket Entries;  
Statement of Claim;  
Affidavit of Defense;  
Stipulation waiving trial by jury;  
Bill of Exceptions (including testimony);  
Opinion, Thompson, J.;  
Præcipe to enter judgment;  
Judgment;  
Exceptions;

Petition for Writ of Error and Order allowing same;  
 Assignments of Error;  
 Clerk's Certificate;

and no others.

(Sgd.)

A. H. WINTERSTEEN,

*Attorney for Plaintiff.*

(Sgd.)

ROBERT J. STERRETT,

*Attorney for Defendant.*

UNITED STATES OF AMERICA,  
*Eastern District of Pennsylvania, set:*

I, George Brodbeck, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, Do Hereby Certify, that the annexed and foregoing is a true and faithful copy of so much of the pleas and proceedings in the case of Worth Brothers Company v. Ephraim Lederer, Collector of Internal Revenue, No. No. 5738, September Sessions, 1918, as per stipulation filed, a copy of which is hereto attached, the transcript of record in the above entitled case is to include, and now remaining among the records of the said court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this — day of April, in the year of our Lord one thousand, nine hundred and nineteen and in the one hundred and forty-third year of the Independence of the United States.

[SEAL.]

GEORGE BRODBECK,  
*Clerk District Court United States,*  
*Eastern District of Pennsylvania.*

167 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1919.

No. 2465. (List No. 46.)

WORTH BROTHERS COMPANY, Plaintiff in Error,

v.

EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania, Defendant in Error.

And afterwards, to wit, on the sixth day of May, 1919, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Wooley, and Honorable Thomas G. Haight, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

168 And afterwards, to wit, on the ninth day of June, 1919, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

169 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1919.

No. 2438.

CARBON STEEL COMPANY, Plaintiff in Error,

v.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Defendant in Error.

In Error to the District Court of the United States for the Western District of Pennsylvania.

March Term, 1919.

No. 2465.

WORTH BROTHERS COMPANY, Plaintiff in Error,

v.

EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

170

March Term, 1919.

No. 2462.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Plaintiff in Error,

v.

FORGED STEEL WHEEL COMPANY, Defendant in Error.

In Error to the District Court of the United States for the Western District of Pennsylvania.

*Opinion of the Court.*

(Filed June 9, 1919.)

Before Buffington, Woolley and Haight, Circuit Judges.

BUFFINGTON, *Circuit Judge*:

These cases concern the construction and application of Section 301 of Title III of the Act of Congress of September 8, 1916, 39

St. 756, 780, which provides: "That every person manufacturing projectiles, shells, \* \* \* or (f) any part of any of the articles mentioned in (b), (c), (d), or (e) \* \* \* shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

An examination of the whole act shows it imposes an excise tax on persons manufacturing either certain mentioned war munitions or appliances, or on persons manufacturing any part of any 171 of the said mentioned articles. Therefore, two questions naturally arise: First, who shall be deemed manufacturers of the mentioned articles, and second, who shall be deemed manufacturers of any part of the articles mentioned.

In ascertaining the true construction of the law and thus carrying out its purpose, this Court must necessarily put itself in the position of Congress when it enacted the law, and from the circumstances and surroundings then existing and the general purpose then in view, seek to ascertain, from what was meant to be done, how best to construe and apply what was done. When Congress took up this matter the situation was that during the two preceding years of the world war, great quantities of war munitions and war accessories had been manufactured in this country and sold to the Allied Governments at high and abnormal prices, owing to the fact that they were abnormal products and the call for them was imperative and instant. It was therefore felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation. That the tax was abnormal and its imposition temporary, was evidenced by the provision: "(2) This section shall cease to be of effect at the end of one year after the termination of the present European war, which shall be evidenced by the proclamation of the President of the United States declaring such war to have ended."

In addition to the feeling that these war supplies manufactured here and sent abroad were proper subjects of temporary taxation, there were other motives which led to the passage of this statute, namely, the pacifist spirit which urged embargo legislation to prevent the exportation of war supplies to belligerents and the pro-German spirit which asserted the furnishing of war munitions to

the Allies was an unneutral act. It will thus be seen that 172 whatever may have been the impelling motive of individual legislators, the fact is that all united in a common purpose to include the whole subject of war munitions and war accessories in a common class. And since all that were thus sent abroad were manufactured here, indeed the act is expressly directed to "such articles manufactured within the United States," and the profits made from such manufacture were the gauge of the taxation imposed, it is clear that the means Congress used to bring the whole subject-matter of war munitions and war accessories within the sphere of taxation was to take these goods as they were manufactured and to impose an excise tax on the person who manufactured such articles or "any part of any of the articles mentioned," and to

fix such tax by "the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States." Such being the case, it follows that the pertinent subjects of inquiry where the act is to be applied is first to ascertain whether the war munitions or war accessories, were articles "manufactured within the United States"; second, if they were so manufactured within the United States, who manufactured such article and if so what were the "net profits actually received or accrued \* \* \* from the sale or disposition of such articles"; third, if they were so manufactured within the United States, who manufactured any part of such article and if so what were the "net profits actually received or accrued \* \* \* from the sale or disposition of such articles."

In thus applying the broad, inclusive terms of the statute, "every person manufacturing \* \* \* shells \* \* \* or any part of any of the articles mentioned," along the lines of inquiry above indicated, it is clear that it must have been in the mind of Congress that complex questions would arise in specific cases and that these difficulties of specific application must be solved on some general principles of the act. Turning to the act, we think the

173 broad purpose of Congress is clear to select as the subject of taxation, war munitions and war appliances, for each of the enumerated articles is such as can be used for war. At the same time it must have been foreseen that many of these articles could also be used for the normal needs of commerce, and those who made them for such normal use were not making abnormal profits. So also the articles that in their completed, unitary form were adapted solely for war purposes might have parts which in and by themselves, could be also used and would naturally be used for the normal purposes of commerce. In view of such recognized facts, was it the purpose of Congress to tax the manufacture of such articles, or parts thereof, which, while susceptible of warlike use, were, in point of fact, not so used, but remained in the channels of normal commerce and use? Clearly not; first, because such articles or parts of articles, when sold in ordinary commerce, did not earn war profits, and second, because the general purpose of the act not to subject the ordinary normal commerce of the country to this abnormal temporary war tax is manifested even in such warlike agencies as gun powder, explosives, caps and the like, by the act providing that such of said articles as are "used for industrial purposes" are accepted. It would therefore seem that the broad general purpose was to include in the field of taxation, all such specified articles or parts thereof as were either made for war purposes or as were withdrawn from the general field of commerce and used for the making of war articles.

Applying these general principles and lines of construction to the act, and in its application to the individual cases arising under it, let us turn to the facts of the three cases here involved, viz.:  
174 Carbon Steel Company v. Lewellyn, Collector; Worth Brothers Company v. Lederer, Collector, and Lewellyn, Collector, v. Forged Steel Wheel Company.

In the first case it appears the Carbon Steel Company made three

substantially similar contracts with the British Government, whereby in one contract it agreed "to manufacture 75,000 4.5" shells Lyddite, \* \* \* suitably packed for export and delivered free alongside steamer New York. \* \* \* Inspection will be carried out at Contractor's works by an inspector or inspectors appointed by the Secretary of State."

In a second contract, the Steel Company contracted to sell, and the British Government to buy, 425,000 shells. The contract provided that in case of "the seller being able to manufacture from its present plants more than 425,000 of the said shells before June 30, 1916, the buyer will accept and pay for any such additional shells up to 175,000." Payment was to be made on "invoices and certificates of inspection, executed by an inspector of the buyer, certifying that such shells have been manufactured and have passed all factory inspection and shop tests with respect thereof. \* \* \* It is understood and agreed that the buyer shall have the right of having one or more inspectors at each of the factories where the shells hereby contracted for, and their component parts, are being manufactured, for the purpose of observing the manufacture thereof and of testing the same at any time before delivered, and that the seller or its sub-contractors, shall furnish all facilities required by such inspector for this purpose. The seller, at its expense, shall furnish all gauges, including master gauges, to be used in connection with the manufacture of the shells hereby contracted for, and their component part, including all gauges required by the inspectors of the buyer."

175 The third contract was substantially of like import. From the contracts, it will be seen that the general purpose of the Carbon Steel Company was to make, or have made—and making is manufacturing—and to deliver in the United States, shells contemplated by the act.

In carrying out the contracts, the shells were made in the United States; they were accepted by the British Government, and the contract price was paid therefor by the Government to the Steel Company, and, as a result, there accrued to the Steel Company "net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States." Such being the fact, it would seem the case falls within the general scope of the act unless the Steel Company can show that in the manufacture of the shells it contracted to have manufactured, it did not manufacture the shell as a whole or any part thereof. Is such the fact?

Now, what was done in this case was this: The making of a shell consisted of nine operations, as follows:

- "(1) Obtaining suitable steel in bar form;
- "(2) Cutting or breaking said steel bars to proper length;
- "(3) Converting said cut bars or slugs into a hollow shell forging by means of a hydraulic press;

"(4) The turning of said shell upon a lathe to exact dimensions;  
"(5) Closing in one end of said forging to form the nose of the shell;  
"(6) Drilling out the case of said shell and the inserting of a base plate;  
"(7) Threading of the nose of the shell and the insertion of the nose bushing, and the insertion in said nose bushing of a wooden plug to protect the thread thereof;

176 "(8) Cutting a groove around the circumference of said shell and the insertion therein of a copper driving band and the turning of said band to required dimensions;  
"(9) Varnishing, greasing and crating of the completed shell."

But when all is said and done, it is clear that the basic operation of shell manufacture was making steel of certain characteristics, for all later steps depended on the composition and characteristics of the steel made in this initial step. This foundation step the Steel Company effected in its own plant, and the relative importance of this first step, compared with the remaining eight, is shown by the fact that the bare material and running expenses involved in this step amounted to somewhat over two millions of dollars as compared with some four millions three hundred thousand paid to sub-contractors as their expenditures for work, material and profits in the other eight steps. The steel thus made in the first step, was the property of the Steel Company, it remained its property while the sub-contractors completed the other eight steps, that was finally transferred by the Steel Company to the British Government. Moreover, during such eight steps every operation of these sub-contractors on the original steel was followed up by employees of the Steel Company, who checked the work as it progressed, and by virtue of the contracts to which we have referred, it was subjected to the inspection of the British Government provided for in the contract. It will thus appear that every step involved in the manufacture of the shell, from the raw product to the finished shell, was either done by the Steel Company itself or by those whom it hired to do some part thereof, and that the original steel base never passed out of the control and direction and ownership of the Carbon Steel Company.

177 To us it is clear that if the law here involved were a draft or conscription law, and that from its operation there was exempted from draft "every person manufacturing \* \* \* shells \* \* \* or any part of the articles mentioned," that all the workmen of the Steel Company engaged in making shells here involved would fall within said exception because they—and therefore the company—were manufacturing shells. We therefore conclude that by virtue of the Steel Company's own work in the first step and by virtue of its effecting and controlling the other eight steps through its sub-agents, the Steel Company was manufacturing

shells, and therefore subject to the tax imposed by this statute. It follows that the judgment of the Court below, which was that the Steel Company could not recover from the Government the tax it had paid, must be affirmed.

In the case of Worth Brothers Company v. Lederer, Collector, coming from the Eastern District of Pennsylvania, the pertinent facts are: The Midvale Steel Company and Worth Brothers Company are correlated to each other in that both companies are owned by the Midvale Steel and Ordnance Company. The Midvale Steel Company contracted with the French Government to sell and deliver about 400,000 high explosive shells to be made under accompanying specifications and under inspection of the Government as the work progressed. The said company was equipped to completely manufacture shells and in fact did, at its own plants so completely manufacture large quantities of the shells thus contracted for. Later it contracted with Worth Brothers Company to furnish the steel and complete six of the initial processes of the shell making which six steps constituted about forty per cent of the cost of the shells.

Thereafter the remaining twenty-nine steps of the shell making process, and which constituted sixty per cent of the cost, was done by the Midvale Steel Company itself. Did the work thus done by the Worth Brothers Company on these six initial steps bring it within the provisions of the act as being a "person manufacturing \* \* \* shells \* \* \* or any part of any of the articles mentioned?"

Turning to the facts we note that the six stages of shell manufacture done by Worth Brothers Company were, as found by the Court below:

"(1) Smelting the ore in the blast furnace into pig iron without however, running it into the moulds which would form what are commercially known as pigs.

"(2) In its molten state transferring it with a ladle into an open hearth furnace where it was converted into steel and tapped out of the furnace and conveyed into moulds in the form of ingots.

"(3) Heating the steel ingot to the proper temperature for rolling when it was rolled in the blooming mill into rounds or blooms.

"(4) The rounds or blooms were then cut with a hot saw into billets of sufficient length, diameter and weight to produce the required shell forging. At this point the French inspectors inspected each individual billet to determine whether there were defects in the steel such as piping or blow holes. After acceptance of the billets so tested, they were chipped to determine whether surface defects existed. At this stage the steel billet, which was the material which was to become the shell forging, is cylindrical in shape, of approximately two-thirds of the outside diameter of the shell forging to be produced and approximately one-third of its length.

"(5) The billet was then taken to the forge shop, heated, from two to three hours in a continuous furnace, and placed in the container

179 or die of a hydraulic piercing press. It was pierced while hot by a piercing bar entering one end and pushing its way to within sufficient distance of the other end to leave a closed end or base. During this process the metal being heated to about 2100 degrees is viscous so that the metal is pushed up to the sides of the die or container. The product of this process was a cylindrical forging, hollow, with one closed and one open end.

"(6) The forging was then taken to a horizontal hydraulic bench and drawn while the metal was hot, so as to increase its length and conform its inside and outside diameter to the required size of the forging ordered by the Midvale Steel Company."

It will, of course, be noted that all six steps were progressive advances toward the chemical constituents, the shape and the dimension required by, and essential to, the manufacture of shells in compliance with the contract. And while, in the first three steps, the work was of such a character that the product made thereby could, up to the fourth stage, have been diverted to general commercial needs, yet as noted, the work done in said three steps was actually done with a view to contract needs and shell requirements. With the fourth step, the contract shell inspection of the French Government began and in the fifth step the fluid metal was taken, from the possibility of use for general commercial purposes, by a hollow-cylindrical forging process which restricted the steel to the field of use for shells. By the sixth step, this hollow-cylindrical forging was drawn to a length, and to an inside and outside diameter which enabled the Midvale Steel Company to thereafter carry forward its twenty-nine progressive steps which, with the six of the Worth Brothers Company, were required by the contract to complete the

180 manufactured shell of the contract. From this it will be seen the Worth Brothers Company selected the material required in the shell; it made the steel which constituted the shell; by work done upon said steel, it segregated it from the general field of commercial use and limited it to use for shell-making. That some of that material when imperfect, was scrapped and used for other mechanical purposes only tends the more strongly to show that the work done by the Worth Brothers Company, in accordance with the contract, was shell work distinctively, for even where it failed by not being up to contract requirements, it was so far removed from the general field of commerce that it was sold, not as an ordinary commercial product, but as scrap, and its subsequent use was only such restricted use for minor objects as scrap heaps permit. It would therefore seem clear that the volume of work done by the Worth Brothers Company—forty per cent of the cost—and the character of that work—segregating the steel from the general field of commercial use and narrowing it to shell use—made its work such as was aptly described by the act as being "manufacturing \* \* \* shells \* \* \* of any kind, loaded or unloaded \* \* \* or any part" of a shell. Indeed, to say that when Worth Brothers Company made the steel which constituted the shell and when by pressing a cavity in the steel they made an outer rim or

shell which gave it such shape as committed and restricted it to shell use, to say that Worth Brothers Company when they were doing this abnormal work and earning abnormal profits thereby, were making those profits neither from manufacturing shells or manufacturing any part of shells, is to lose sight of substance and of the purpose of Congress in using the plain, broad, inclusive words of this statute.

The statute shows on its face that Congress contemplated 181 that cases would arise where parts of the articles named would, if not indeed must, be made by joint co-operation. Indeed the found facts in this case show that not more than two or three plants in the whole country were equipped to make a complete shell. Shell making in this country had been going on for the two preceding years. It was well known that the shells made for the Allies in the United States were manufactured by the joint work of different plants. In the light of these facts, it would seem that a construction of the act which narrowed its application to the case of a plant that did the entire work, would defeat the whole purpose of Congress which presumably was to subject the profits of all engaged in the manufacture of shells or any part thereof, to this excise tax. Such being the case, we hold the tax imposed on Worth Brothers Company was justly laid and the judgment of the Court below which held the company could not recover the tax from the Government was right and should be affirmed.

We next turn to the case of the Forged Steel Wheel Company against Lewellyn, Collector. From the proofs it appears the British Government made contracts with certain persons whereby the latter agreed to supply it with high explosive shells in compliance with the specifications, requirement and inspection of the said Government. To fulfill such shell contract the contractor made sub-contracts with the Forged Steel Wheel Company, by which the latter agreed to manufacture and furnish to said contractor, rough steel shell forgings of the character provided in the contract, as to chemical constituents, tensile strength, size, shape, etc. To fulfill its contract, the Forged Steel Wheel Company either made, had made or bought in the market, the grade of steel required. This steel was

of a common commercial type known as rounds. These 182 rounds it nicked and broke into eighteen-inch lengths, which it then heated and put through two forging processes, by the first of which a hole was pierced from one end of the round to within two inches of the other; by the second, the round was lengthened by drawing it through three successive rings of a hydraulic press. The output of the Forged Steel Wheel Company's work was a hollow steel body or shell form, of suitable composition, shape and length, from which to make, to the British Government standards, the high explosive projectiles contracted for. The weight of such shell forms was about one hundred and seventy pounds. To make this shell form suitable for use as a shell, the contractor to whom the Forged Steel Wheel Company then delivered it, was required to dress, bore and machine it down to seventy-seven pounds, this required some twenty-seven distinct and separate processes. Such being the facts, did the work of the Forged Steel Wheel Company noted above make

it "a person manufacturing \* \* \* shells \* \* \* or any part of" a shell? The Court below held it did not, and such holding constitutes the question involved in this case.

In reaching that conclusion, the lower Court construed the act as though it read "a person manufacturing \* \* \* shells \* \* \* or any component, completed, part of" a shell, in that regard saying: "I am therefore of opinion that Congress meant to levy the tax only upon those persons who were manufacturing and selling at a profit the completed things specifically designated in (b), (c), (d) and (e), and on those persons who were manufacturing and selling at a profit any completed part of any of those designated things. That one is not a manufacturer of a part unless the manufacture of that part is carried forward by him to the same point of completion to which it would have been necessary to carry it, if he had 183 been the manufacturer of the completed thing."

The Court was also influenced, first, by the fact that, as stated in its opinion, "The completed shell is a composite structure, consisting of six different parts: First, the shell body in one piece, cylindrical in shape, with a pointed head to increase its speed in flight and its power of penetration. Second, a copper driving band near the base of the shell body projecting slightly so as to engage the rifling of the gun. This gives the shell its rotary motion necessary for precision in flight. Third, a base plate inserted into the bed of the shell to prevent premature discharge. Fourth, a nose bushing of two parts, one of which screws into the shell body and the other into the fuse. Fifth, the fuse, either time or percussion, a highly complicated piece of mechanism screwed into the nose bushing. Sixth, the high explosive charge. These several parts or pieces of mechanism, each delicately constructed and designed not only individually but with reference to each other, when assembled together, constitute a high explosive shell."

Starting with the unquestioned premise that a completed shell was made up of assembling six separate and complete parts, the Court assumed that the purpose of Congress was not to tax anyone but (a) the manufacturer of a completed shell, or (b) the maker of a completed part of a shell; and that because the shell form the Forged Steel Wheel Company made was not a completed part of a shell, that it was therefore not subject to the excise tax imposed by the statute.

Now, it is manifest that standing alone the statute neither expresses nor implies any warrant or implication for limiting the broad, inclusive, generic words "any part" to the restricted, specific, qualified term "any completed part." It follows, therefore, 184 that ground for inferring such intent in the mind of Congress must arise from something apart from the language of the act itself. Such intent the Court below found in certain decisions of the Federal Courts involving tariff laws which exempted from duty "manufactured" articles. And these decisions holding what were "manufactured" articles in tariff legislation the Court below held Congress must have had in mind in passing this excise

law saying, "We must assume that Congress well knew the distinction between a completely manufactured thing, or part of a thing, and a partial manufacture of that thing. Many revenue acts have levied a tax upon manufactured articles or parts thereof, and others have levied a tax upon a partial manufacture."

On the other hand, in the Worth Brothers Company case, decided above, the Court below held these tariff decisions did not affect the construction of this statute, saying: "The rule has been applied in the classification of articles of merchandise imported and subject to customs duties or upon which drawback is allowed. There are decisions as to what constitutes a manufactured article, what constitutes a part of a manufactured article, what constitutes a partially manufactured article, what constitutes a manufacture of certain material and what constitutes a wholly manufactured article dependent upon the terms of the law under which a tax is laid upon the article itself, or under which a drawback or other privilege is allowed. I cannot perceive that these cases have any bearing upon the question arising in this case unless the terms of the act imply that the tax is to be imposed only upon the business of manufacturing to completion shells or parts of shells, and there is no such limitation in its terms.

The clear purpose of the act is through taxation of the business or occupation of manufacturing munitions of war to reach the profits of all those engaged in such manufacture whether engaged in manufacturing to completion or engaged in any part of such manufacturing."

We are of opinion the latter Court was right in so regarding these customs decisions, for when the objects which Congress had in view in framing the Customs Acts and this excise law, are considered, it will be seen they are wholly different. In Customs law the primary object of Congress in their passage was to protect domestic against foreign labor, and to effectuate this object the customs duties were so imposed that where all the work necessary to be done upon the imported article to fit it for use in the United States had been done abroad, such article or the part so completed and fitted for use, was to carry out that primary intent, held to be a manufactured article, or a manufactured part, and therefore subjected to the duty. On the other hand, if work upon the imported article, or imported part, before it was fit for use remained to be done in this country, such article or part was held not to be a manufactured article within the scope of the law, and therefore not subject to the tariff duty. The necessity of bearing this primary purpose in view in construing Customs Acts was set forth in Tide Water Oil Company v. United States, 171 U. S. 216, where the Supreme Court, referring to a customs act, said: "The object of the section was evidently not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with

the same articles manufactured in other countries. In determining whether the articles in question were wholly manufactured in the United States, this object should be borne

steadily in mind." Indeed, it is, on the one hand, this presence of work already done which has fitted an object for use, or it is on the other hand, a residue of work necessary to fit the object for use, which brings the article within or without the description of the manufactured article of the tariff law. This is well summarized in Tide Water Oil Company v. United States, 171 U. S. 216, where it is said: "Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for which the article so manufactured receives a different name. The material of which each manufacture is formed, and to which reference is made in section 3019, is not necessarily the original raw material—in this case the tree or log—but the product of a prior manufacture; the finished product of one manufacture thus becoming material of the next rank."

From these decisions it will be seen that these tariff laws deal with manufactured articles, from the standpoint of protecting domestic labor, and the imposition of import duties is an incident in effectuating that main purpose.

But in the excise law in question, Congress is dealing with the imposing of taxes as the main object and with the work done 187 as a mere incident to aid in determining the tax. In that aspect the quantum of the work done is immaterial.

Indeed, from a study of customs decisions, it will be seen that from the basic standpoint of protecting domestic labor, the imposition of import duties is a mere incident or means to effectuating such main purpose, and the term "manufactured article" must therefore be construed and applied with such purpose in view. It follows, therefore, that in such case the quantum of labor done or left to be done, is all-important in the practical administration of customs laws. On the other hand, the whole purpose of excise law is to produce revenue and it is the fact of manufacture and not the quantum of labor that is the determining factor. Indeed, the object of the statute, viz., the raising of revenue, may be reached where a minimum of labor is used in the manufacturing taxed, for as the net profit is the basis of taxation, it follows that the smaller the relative amount expended in physical labor in a manufacturing operation, the greater may be the relative net profit which determines the tax. Moreover, it will be apparent that a manufacturing operation in which much labor has been used, may not involve any net profits while another involving much less labor may result in taxable net profits. It will therefore be apparent that in an excise tax on manufacturing measured by net profits, the crucial question is not the quantum of the manufacture measured by steps but the fact of manufac~~ture~~ re-

sulting in profits. Gauging the operations of the Forged Steel Wheel Company by this standard, it would seem clear that in doing the basic shell work it did that company was, in the broad and general sense of fulfilling this contract, a "person manufacturing \* \* \* shells \* \* \*" and by virtue of the particular manufacturing stages it completed in the making of such shells 188 the company fell within the class of a "person manufacturing \* \* \* any part of any of the articles mentioned." Such being the case, the excise tax was lawfully laid on the "net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States." It follows, therefore, the judgment recovered by it below was erroneous and must be reversed.

189 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1919.

No. 2465. (List No. 46.)

**WORTH BROTHERS COMPANY, Plaintiff in Error,**

v.

**EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania, Defendant in Error.**

**In Error to the District Court of the United States for the Eastern District of Pennsylvania.**

*Order Affirming Judgment.*

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

**JOS. BUFFINGTON,**

*Circuit Judge.*

Philadelphia, June 9, 1919.

(Endorsed: 2465. Order Affirming Judgment. Received & File Jun. 9—1919. Saunders Lewis, Jr., Clerk.)

190

*Clerk's Certificate.*

**UNITED STATES OF AMERICA,**

*Eastern District of Pennsylvania,*

*Third Judicial District, etc.:*

I, Saunders Lewis, Jr., Clerk, of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing

be a true and faithful copy of the original record and proceedings in this court in the case of Worth Brothers Company, plaintiff in error, v. Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, defendant in error, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 24th day of July in the year of our Lord one thousand nine hundred and nineteen, and of the Independence of the United States the one hundred and forty-fourth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,

*Clerk of the U. S. Circuit Court of Appeals, Third Circuit.*

191 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which Worth Brothers Company is plaintiff in error, and Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, is defendant in error, No. 2465, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme

192 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of October, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States.*

193 [Endorsed:] 2465. File No. 27,280. Supreme Court of the United States, No. 525, October Term 1919. Worth Brothers Company vs. Ephraim Lederer, Collector of Internal Revenue, etc. Writ of Certiorari. Received Oct. 29, 1919. Saunders Lewis, Jr., Clerk.

194      United States Circuit Court of Appeals for the Third Circuit,  
March Term, 1919.

No. 2465.

WORTH BROTHERS COMPANY, Plaintiff in Error,  
vs.

EPHRAIM LEDERER, Collector of Internal Revenue for the First  
District of Pennsylvania, Defendant in Error.

*Stipulation and Agreement.*

Whereas, a writ of certiorari, directed to the Judges of the United States Circuit Court of Appeals for the Third Circuit, was issued by the Supreme Court of the United States under date of October 24th, 1919, commanding that the record and proceedings in the above entitled cause be sent without delay to the said Supreme Court, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

And whereas, a certified copy of the Transcript of the record and proceedings in the said cause is now on file in the office of the Clerk of the Supreme Court, the same having heretofore been procured and lodged there by Worth Brothers Company, petitioner, in connection with its Petition for a writ of certiorari, which Petition was granted by the Supreme Court on the 20th day of October, 1919.

It is now and hereby stipulated and agreed that said certified copy of the Transcript of the record and proceedings in the above entitled cause now on file in the Supreme Court may be taken as a  
195      Return to said writ of certiorari, with the same full force and effect as if an additional transcript of said record and proceedings were at this time certified to the Supreme Court.

A. H. WINTERSTEEN,

*Attorney for Worth Brothers Company, Plaintiff in Error.*

FRANCIS FISHER KANE,

*Attorney for Ephraim Lederer, Collector, Defendant in Error.*

Dated October 28th, 1919.

Endorsements: 2465. Stipulation of Counsel for Return to Writ of Certiorari. Received & Filed Oct. 29, 1919. Saunders Lewis, Jr., Clerk.

196      UNITED STATES OF AMERICA,  
*Eastern District of Pennsylvania,*  
*Third Judicial Circuit, set:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original stipulation of counsel for

return to writ of certiorari in the case of Worth Brothers Company, Plaintiff in Error, vs. Ephraim Lederer, Collector of Internal Revenue, Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 29th day of October in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the United States the one hundred and forty-fourth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,

*Clerk of the U. S. Circuit Court of Appeals, Third Circuit.*

197 [Endorsed:] File No. 27,280. Supreme Court U. S., October Term, 1919. Term No. 525. Worth Brothers Company vs. Ephraim Lederer, Collector of Internal Revenue, etc. Writ of certiorari and return. Filed October 30, 1919.

# In the Supreme Court of the United States.

OCTOBER TERM, 1919.

WORTH BROTHERS COMPANY, PETITIONER,  
v.  
EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

} No. 525.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.*

## MOTION OF RESPONDENT TO ADVANCE.

Comes now the Solicitor General on behalf of the respondent herein and respectfully moves the advancement of the above-entitled cause for hearing during the present term.

The case involves the construction of section 301 of the Act of Congress approved September 8, 1916 (39 Stat. 780, 781), known as the Munitions Manufacturer's Tax Act, which provided, among other things, that persons manufacturing "shells" or "any part" thereof should pay an excise tax of 12½ per cent upon the net profits derived during the taxable year from the sale or disposition of such articles

manufactured within the United States. Petitioner contracted with the Midvale Steel Company to make for it certain shell forgings, and the question arises whether it was a person manufacturing "shells" or "any part" thereof within the meaning of the Act. Suit was instituted by petitioner to secure a refund of taxes imposed upon it under said section and paid by it under protest. Judgment was entered against petitioner in the District Court, which was affirmed in the Circuit Court of Appeals.

Numerous claims, aggregating several millions of dollars, for the refund of taxes levied under said section 301 are now pending in the Federal Courts and before the Commissioner of Internal Revenue. Several of the United States District Courts have construed said section and conflicting decisions have resulted. It is important, therefore, that this case be set for early hearing.

Counsel for petitioner concur and join in the request for the advancement of this cause.

ALEX. C. KING,

*Solicitor General.*

NOVEMBER, 1919.



Office Supreme Court, U. S.  
FILED  
SEP 18 1919  
JAMES D. MAYER,  
C.

IN THE  
**Supreme Court of the United States**

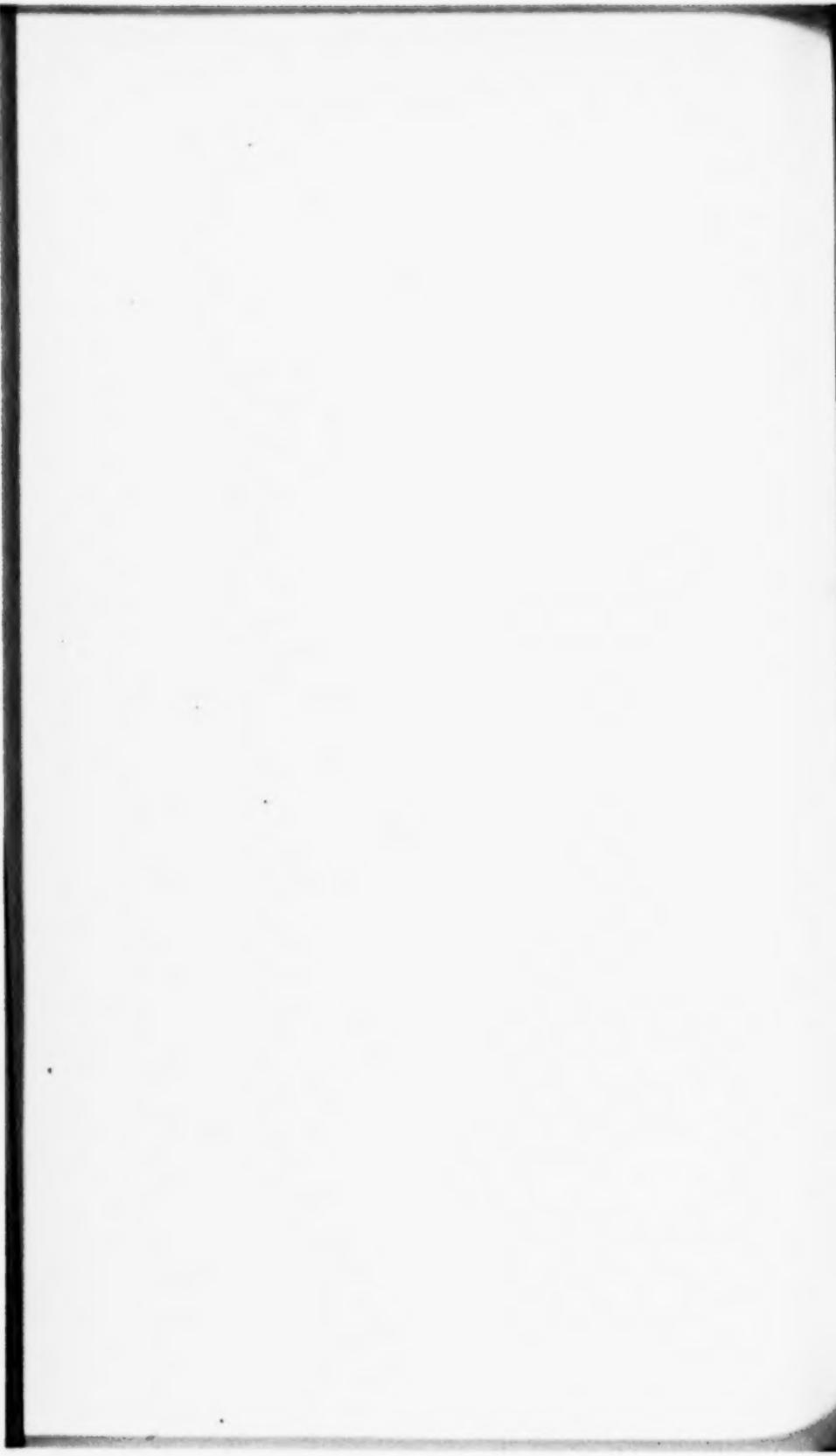
OCTOBER TERM, 1919. *No 535*

WORTH BROTHERS COMPANY, Petitioner,  
vs.

EPHRAIM LEDERER, Collector of Internal Revenue for  
the First District of Pennsylvania, Respondent.

PETITION OF WORTH BROTHERS COMPANY FOR WRIT OF  
CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN  
SUPPORT THEREOF.

A. H. WINTERSTEEN,  
MORRIS BUILDING, PHILADELPHIA, PA.,  
CHADBOURNE, BABBITT & WALLACE,  
14 WALL STREET, NEW YORK,  
*Attorneys for Petitioner.*



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# In the Supreme Court of the United States.

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OCTOBER TERM, 1919.

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*Worth Brothers Company, Petitioner,*

vs.

*Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, Respondent.*

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## PETITION OF WORTH BROTHERS COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TO THE HONORABLE, THE JUSTICES OF THE SUPREME  
COURT OF THE UNITED STATES:

Your petitioner respectfully prays for a writ of *certiorari* to review the judgment of the Circuit Court of Appeals for the Third Circuit, and shows:

On October 7th, 1918, the petitioner, as plaintiff, brought an action at law in the District Court of the United States for the Eastern District of Pennsylvania against Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, to recover \$74,857.07, the amount of certain excise taxes exacted of the petitioner and paid by it under protest, which taxes were assessed for the calendar year 1916 under Section 301 of Title III of the Act of Congress of September 8th, 1916, 39 St. 756, 780, reading as follows:

"That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d) or (e); shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half percentum upon the entire net profits actually received or accrued for said year from the sale or disposition of such article manufactured within the United States."

The petitioner had a large plant at Coatesville, Pennsylvania, where it was manufacturing steel products of various kinds. Upon orders received from The Midvale Steel Company (hereinafter called Midvale)—a corporation of the State of Pennsylvania, and then having a contract with the French Republic for the manufacture, sale and delivery to that Government, of high explosives—the petitioner in 1916 made for Midvale certain shell forgings which Midvale needed for said contract.

#### THE ESSENTIAL QUESTIONS INVOLVED.

Under the above statute, as related to the facts in the present case, the issues here are purely questions of law, and are, in brief, these:

- (1) Were these forgings as made by petitioner and sold to Midvale, shells or any part of shells within the meaning and intendment of the Act?
- (2) Was the petitioner a person manufacturing shells or any part of shells?

These forgings were rough cylindrical bodies, closed at one end and wide open at the other, developed by the petitioner from the ore stage by six different processes, to a stage on their way to completed shell bodies, which stage, when they finally passed out of petitioner's hands, was 29 stages short of completed shell bodies. The shell body, moreover, was but one out of four distinct parts constituting the completed shell, and the work performed by petitioner was but one-fifth of the total work required upon this one of such four essential parts, to prepare it for assembling with the other parts into the completed shell.

The trial Judge found (*a*) that these shell forgings as made by petitioner were shells or parts of shells within the meaning of the above statute, and (*b*) that petitioner was a person manufacturing shells or parts of shells within the meaning thereof, and he therefore sustained the tax. (See Transcript of Record, page 142; 256 Fed. Rep. 116.) The judgment entered for the defendant Collector from whom the petitioner sought the refund was affirmed by the Circuit Court of Appeals for the Third Circuit on June 9, 1919 (Transcript of Record, page 170).

With the later stages of further production and the processes involved in them, which were all performed by Midvale, the petitioner had nothing to do. These *later* processes included the following, as found: Cutting to proper length; lathing and boeing to proper inside and outside diameter; forging to produce the ogival head (otherwise called nosing in); annealing; hardening; machining to proper contour; machining and hard finishing the threads at the nose and shoulder and thread within; finishing, sand blasting, and other processes to render the surface smooth and clear of scale and roughness. They involved, among other things, material reductions in the outside diameter and the length of the shell forgings; increase in the inside diameter; and very substantial reduction in weight—in the

case of the 220 m/m forgings from 351 pounds to 160 pounds. The tensile strength of the metal as delivered by the petitioner was increased by Midvale from 85,000 pounds to a minimum of 113,750 pounds. The work performed by Midvale on this single *part* of the shell represented 60 per cent. of the cost of the completed shell bodies, and such single part was but one out of four distinct parts essential to the completed shell. The petitioner's work upon the material from the ore stage amounted to only 40 per cent. of the cost of such completed shell body.

The shell forgings supplied were intended for development by Midvale into shell bodies—the *shell body*, AS FOUND BY THE TRIAL JUDGE, being *one of four distinct parts* of the completed shell of the French type, the other parts being the *copper driving band*, the *nose timing fuse*, and the *high explosive charge* or content. The composite structure became a practicable shell only when the parts were assembled together after elaborate and complete fabrication, and the parts of the shell were capable of association with other parts only after themselves being completely or substantially in a finished condition. But no such assembling could have been successfully attempted, with the shell forgings in the condition in which they were when delivered by petitioner to Midvale.

Upon the net profits derived from the sale of the above forgings, as shown in the petitioner's Return, a tax of twelve and a half per centum was imposed, as upon profits received from the sale or disposition of articles included within the scope of the Act.

The action in the Court below was to recover the above tax after the usual course was taken of submitting to the Commissioner of Internal Revenue a Claim for Refund, and it being rejected. The case was tried in the District Court upon an Agreed Statement of Facts, and upon certain evidence given in explanation of the product and processes of manufacture—a jury trial being waived.

With the petitioner's case in the Circuit Court of Appeals there was argued another case in which precisely the opposite conclusion had been reached, to wit, the case C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Plaintiff in Error, *vs.* Forged Steel Wheel Company, Defendant in Error, brought on writ of error from a judgment in favor of that corporation in the District Court of the United States for the Western District of Pennsylvania, after trial before District Judge Thomson, on January 2nd and 3rd, 1919. That case was essentially identical with the petitioner's case, excepting that it involved material fabricated for incorporation into shells of a smaller size. The trial Judge gave binding instructions for the plaintiff, whose position was like the position of your petitioner upon the issues, and, in an Opinion on the defendant's motion for a new trial subsequently filed, definitely found for the plaintiff, holding that the plaintiff was not a person manufacturing shells or any part of shells within the meaning of the Act. A copy of the Opinion so holding will be found in the Transcript of Record accompanying the petition of the Forged Steel Wheel Company for *certiorari*, submitted contemporaneously with this petition, at page 275.

The situation, therefore, as it existed when the two cases came before the appellate Court, was that two District Courts had construed the section of the Act in question, as applied to the same state of facts, diametrically opposite one to the other—one court holding that the income derived from the sale of rough shell forgings was not subject to the tax, and the other court holding directly to the contrary. The appellate Court, while affirming the judgment of the Court below in the petitioner's case, reversed the judgment for the Forged Steel Wheel Company in the Western District of Pennsylvania. But one Opinion was filed, applying to both cases. The Opinion covers also the case of Carbon Steel Wheel Company *vs.* Lewellyn, Col-

lector, which had been previously argued in the appellate Court. The facts in that case have no such relation to those in the two other cases as to make the decision as to it determining of the others.

The petitioner submits, together with this petition, a certified copy of the Transcript of Record, including the proceedings in the Circuit Court of Appeals.

#### REASONS RELIED ON.

Among the reasons relied on for the allowance of the writ are the following:

##### I. QUESTIONS OF LAW ARE OF GREAT PUBLIC IMPORTANCE.

The questions of law involved are of great public importance, and of serious concern both to a large number of persons throughout the country the amount of whose tax obligations depends upon the correct construction of the Act, and also to the Government itself, to whom it is important that it may know authoritatively and finally, through one decision broadly operative, how far it may go in levying taxes under the section of the Act in question, and to what extent, if at all, it must provide for refunding taxes already levied and collected, and paid under protest.

##### II. MANY OTHER SIMILAR CLAIMS PENDING.

Besides the petitioner's claim, and the claim of Forged Steel Wheel Company, so submitted contemporaneously, there are pending and awaiting decision, either in the courts or in the office of the Commissioner of Internal Revenue, claims against the Government of a number of parties, aggregating several millions of dollars, asserting the right to refund of taxes on net profits on sales of material entering severally into vari-

ous articles of those named in the statute, on the ground that the material, when sold and delivered, was not, in law, any part of the articles the net profits on which were made taxable, and that the persons taxed were not persons manufacturing any part thereof. The litigation of these claims independently to a final conclusion, if proceeded with, will involve large expense both to the various claimants and to the Government. This expense will be entirely avoided if a final construction of the section of the Act brought up on this petition is given by this Court, as a guide to the lower courts and to the various claimants.

In an Appendix to the Brief herewith submitted (page 44) the petitioner has scheduled a list of some of the pending claims which have come to its knowledge, the final determination of which depends upon the proper construction of the Act.

Moreover, the section of the Act was considered by the lower court merely in its application to shell forgings. It also taxes profits derived from the sale of a number of other articles or "parts" thereof, among which are projectiles, torpedoes, firearms, cannon, machine guns, rifles, bayonets, electric motor boats and submersible vessels.

Thousands of citizens who supplied material entering into the above various articles are no less vitally interested than is the petitioner in the soundness of the lower court's construction of the statute—resting, as it did, on the purpose or intent of the Act as the court conceived it, instead of upon the meaning of the words used to express the actual intent.

### III. ERRORS OF THE COURT AND CONFLICT OF DECISION AS BETWEEN ITS OPINION (THIRD CIRCUIT) IN THIS CASE, AND DECISIONS OF THE CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT, AND OTHER FEDERAL COURTS, AS HEREINAFTER SET FORTH IN DETAIL IN THE BRIEF ACCOMPANYING THIS PETITION.

The important words in the Section of the Act for consideration are, "any part of any of the articles men-

tioned" and "any person manufacturing," as applied to the subject matter.

The meaning of the word "part" or "parts" of a composite structure has been established for years, in numerous decisions, as signifying a *substantially finished part* as related to the whole structure and to the purpose it is intended to subserve.

The meaning of the words "manufactured article" has also been definitely adjudged as implying that the processes of manufacture devoted to it must be so far completed as to render the article ready for use without additional processes of manufacture, and that, short of the carrying of any article to the stage of practical completion, the work upon it is nothing but a *partial manufacture*, and the person performing the work upon it is *not a person manufacturing it*. (See accompanying Brief, pages 22-30.)

The decision of the Court below is directly in the face of the authorities establishing the above propositions. The refusal of the court below to follow the precedents in interpreting the meaning of the words, on the ground that the precedents were established in customs duties cases, and that the protection of domestic industry was the moving reason for the prior decisions on the point, we claim to be without warrant. In our Brief we show that one of the earliest authoritative decisions establishing that in order for a particular commodity to be considered a part of a composite article for which it is designed, it must be a substantially completed part, was *United States vs. Thirty-One Boxes*, 28 Federal Cases, p. 56, (Dist. Ct. S. D. New York) (1833)—that case arising under the Act of 1824, when the "tariff for revenue," as distinguished from the "tariff for protection" doctrine prevailed in our legislation.

We also show that the distinction between a manufacture of a part and a partial manufacture has been definitely established or recognized by this Court in such cases as the Sugar Bounty Cases, and also by the Federal Courts in bankruptcy or insolvency cases, in which cus-

toms tariff theories had no place in determining the meaning of the statutory words involved.

The section of the Act has a very wide and quite sufficient application without it being necessary to extend its scope in the way the lower court did. In the accompanying Brief there is printed (page 40 *infra*) a list of distinct parts of various kinds of the articles specified, which are commonly recognized as parts for assembling or sale purposes, and manufactured and known in the art and trade as such. The Act would therefore, have a very definite and at the same time wide application to well recognized parts of the articles mentioned, without extending the meaning of the word "part" as the court has done, artificially, and against the precedents.

IV. THE LOWER COURT'S RULING WAS DIRECTLY AGAINST THE WELL ESTABLISHED RULE OF CONSTRUCTION OF TAXING STATUTES, THAT A TAX IS NEVER IMPOSED ON A CITIZEN WHEN THE QUESTION OF HIS LIABILITY IS AT ALL DOUBTFUL. *Gould vs. Gould*, 245 U. S. 151, 153.

V. THERE ARE PRECEDENTS IN THIS COURT FOR THE ALLOWANCE OF THE WRIT.

The exercise of this Court's jurisdiction in favor of granting the writ, would be in accordance with such precedents as *Von Baumbach vs. Sargent Land Co.*, 242 U. S. 503, and *Lynch vs. Turrish*, 247 U. S. 221. In those cases this Court reviewed on *certiorari* certain judgments obtained by the Government against defendants under, respectively, the Corporation Tax Law of 1909 and the Income Tax Act of 1913, both of which Acts had been repealed or superseded by other Acts when this Court took jurisdiction—the taking of jurisdiction being clearly for the purpose of having a final construction given to certain aspects of those statutes, when the interests of a large number of persons were involved, and litigations and claims, to an indefinite number and extent, were affected.

Wherefore, the foregoing matters being considered, your petitioner prays that the Court will grant its writ of *certiorari* directed to the United States Circuit Court of Appeals for the Third Circuit, requiring that Court to certify a full and complete transcript of the record in the above entitled cause to this Court for review, and that this Court will thereupon proceed to correct the errors complained of, reverse the judgment for the respondent and remand the cause, and give your petitioner such other and further relief as the nature of the case may require, and to the Court may seem proper in the premises.

And your petitioner will ever pray.

WORTH BROTHERS COMPANY  
By

A. A. COREY, JR.,  
*Vice President.*

A. H. WINTERSTEEN,  
CHADBOURNE, BABBITT & WALLACE,  
*For Petitioner.*

#### CERTIFICATE.

I certify that I am attorney for and of counsel for the petitioner herein; that the allegations contained in said petition are true, and that said petition is, in my opinion, well founded in point of fact as well as law.

A. H. WINTERSTEEN,  
*Attorney for Petitioner.*

## BRIEF IN SUPPORT OF PETITION.

The Court is asked in this Petition to call up for review on *certiorari* the construction by the Circuit Court of Appeals for the Third Circuit of Section 301, Title III, of the Act of Congress of September 8, 1916, which imposed a tax of twelve and one-half per centum on the net profits received from the sale of certain articles manufactured within the United States and selected by Congress for special taxation. The text of the section is transcribed on the second page of the petition.

The subject-matters of the taxation are:

- (a) Gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes;
- (b) Cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes;
- (c) Projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition;
- (d) Firearms of any kind, and appendages, including small arms, cannon, machine-guns, rifles and bayonets;
- (e) Electric motor boats, submarine or submersible vessels or boats; or
- (f) Any part of any of the articles mentioned in (b), (c), (d) or (e).

The specific articles covered by the decision of the lower Court were certain rough shell forgings made by the petitioner during the year 1916 for Midvale, for use by the latter in making finished high-explosive shells which it had contracted with the Government of the Republic of France to make and deliver.

The forgings were rough cylindrical articles, open at one end, fabricated from the ore stage by six processes. They were intended to be used by Midvale, the contractor with the French Republic, for development by it through such further processing into shell bodies. The material had to go through twenty-nine important different forging and machining processes in the hands of Midvale before becoming shell bodies. These processes cost sixty per cent. of the total cost of the completed shell body. The completed shell body is only one of four distinct parts of the shell of the French type, the other parts being the copper band, the fuse and the high-explosive content.

The forgings were of course not shells, the shell being a composite thing and each part being necessary to make up the whole.

The questions were:

(1) Were the forgings in their state of delivery to Midvale any part of shells within the meaning of the Statute, and

(2) Was the petitioner a person manufacturing any part of shells within its meaning?

The appellate Court, reversing the contrary ruling of one District Court in the circuit, and affirming that of another in the same circuit, decided both questions in the affirmative and sustained the tax.

We ask review by this Court, in exercise of its discretion to call up:

## I.

**BECAUSE OF THE WIDE PUBLIC IMPORTANCE OF A FINAL CONSTRUCTION OF THE STATUTE BY THIS COURT.**

Vitally interested in the interpretation of the Act are not merely those material men who supplied shell forgings to

contractors for development into shells, but also all the material men throughout the country who have sold to others partially developed material subsequently used in making any of the articles, the profits from the sale of which are made taxable by the act. Those articles, it will be noted, include not merely those commonly known as munitions of war, but also others such as electric motor boats, which, for many years, in time of peace as well as war, have had a very wide use for business and pleasure purposes. Many claims for refund of taxes, based upon the construction of the act for which the petitioner is contending, are pending in the Office of the Commissioner of Internal Revenue, or were pending when the judgment now sought to be reviewed was handed down, while others are in suit in court awaiting this Court's action.

In the Appendix is a partial list of pending claims known by the petitioner to exist—the list showing amounts involved, the character of the claims and their status. It is necessarily fragmentary—the government officials, upon application made for a complete list, not having been able to furnish the information desired.

## II.

BECAUSE A FINAL CONSTRUCTION OF THE ACT BY THIS COURT UPON THE ISSUE RAISED BY THE PLEADINGS IN THE CAUSE WILL AVOID LITIGATION AND SAVE GREAT EXPENSE, BOTH TO THE GOVERNMENT, AND TO NUMEROUS CLAIMANTS WHO ARE ALREADY PRESSING CLAIMS FOR REFUND IN VARIOUS JURISDICTIONS, AS WELL AS TO THOSE WHO HAVE YET TO PRESENT THEM WITHIN THE TIME LIMIT FIXED BY THE STATUTE.

(See Appendix to this Brief, page 44.)

## III.

BECAUSE, AS THE PETITIONERS CONCEIVE, THE DECISION OF THE COURT BELOW WAS GRAVE ERROR, WHICH WE BELIEVE CAN BE DEMONSTRATED TO THE SATISFACTION OF THIS COURT UPON FULL ARGUMENT, WITH THE MANUFACTURING EXHIBITS THROWING LIGHT ON THE SUBJECT-MATTER AVAILABLE FOR THE COURT'S INSPECTION.

## THE ERRORS OF THE COURT BELOW.

## I. THE FUNDAMENTAL ERROR.

The fundamental error of the Court was in its conception that the purpose of the statute, as the Court viewed it, controlled its construction, instead of its construction being determined by the meaning of the words used by the law-makers to carry out that purpose.

The Court held that the purpose was to tax the profits derived from all such specified articles or parts thereof as were either made for war purposes or were withdrawn from the general field of commerce and used for the making of war articles. Conceiving that to be the end sought, the meaning of the essential words of the statute used to accomplish it was made to conform to the purpose found, the settled meaning of those words being ignored or construed away—with the result that the petitioner's case was dismissed as without merit.

*Our position, on the contrary, was and is that the essential inquiry was not what Congress intended, but what is the meaning of the words it used to express that intent, and that that meaning, when ascertained, not only determines the meaning of the statute but the Congressional intent in enacting it. That is the settled law laid down by this Court.*

*In United States vs. Goldenberg*, 168 U. S. 95, 102, the Court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function to legislate, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies \* \* \* justify any judicial addition to the language of the statute."

And in *Bart Refrigerating Co. vs. Sulzberger*, 157 U. S. 1, 37:—

"As declared in *Hadden vs. Collector*, 5 Wall 107, 111, 'what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes.' *Where the language of the act is explicit, this Court has said 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the Legislature.* \* \* \* It is not for the Court to say, when the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.' *Scott vs. Reed*, 10 Pet. 524, 527."

2. THE ERROR IN THE COURT'S RULING THAT THE FORGINGS INVOLVED IN THE CASE WERE PART OR PARTS OF SHELLS.

Under the rules and the practice of this Court, as we understand them, on such a petition as the present, discussion at any length of the reasoned meaning of the word "part" in a composite structure is not called for. It is sufficient to say that by numerous adjudicated cases in the courts, including the Customs Court (which is the court of last resort in customs cases), and by the Boards of General Appraisers—the cases extending over three-quarters of a century—it has been settled that when parts of a composite article are declared taxable, the material constituting the parts must be finished or practically finished, and be in condition to be assembled with or united to another part or parts to make up the practicable thing of which they are a necessary component. Short of development up to that stage a fabrication intended for ultimate use in a composite structure is nothing but material entering into a "part."

The same practical principle of interpretation of objective words in taxing statutes has also determined the ruling that when a particular article, whether of a composite character or a single unit, is made taxable, it must, when it comes before the taxing authority, be developed up to a condition to make it the thing that is taxed, that is to say, it must be finished—unless in the statute itself the article is made taxable in an unfinished condition.

THE CASES:—

The following are a few of the cases establishing the above propositions:

*United States vs. Thirty-One Boxes*, 28 Federal Cases, page 56. Dist. Ct. S. D. New York (1833);

Question of unfinished links as "parts of chains" under Tariff Act of 1824.

*Held.* "Nothing can be deemed part of the chain that is not as to itself as finished and complete as the entire chain"—even though the articles in question would be fit for nothing but scrap iron unless made into chains.

*In re Blumenthal*, 51 Fed. Rep. (Aff'd 1 U. S. App. 680) C. C. U. S., S. D. New York (1892):

*Held* that disks of mother of pearl intended for buttons and complete excepting that they were not pierced with holes or shanked through their centre, were not buttons under the Tariff Act of October 1, 1890, the Court saying:

"Although they may stop short of being complete buttons by a very small measure, that circumstance is immaterial; and it is also wholly immaterial with what intent the process of their manufacture was stopped at that point. \* \* \* These articles here are not completed buttons, because they lack the essential element of a device whereby they may be affixed to garments."

*In re Protest of Reiss Bros. & Co.*, T. D. 16077—G. A. 3405, Synopsis of Treasury Decisions, 1896, page 273:

The question was whether unfinished or incomplete pipe bowls composed of meerschaum, were pipe bowls or smokers' articles under the Tariff Act of 1894, when they were not bored out so as to subserve the purpose of pipe bowls in holding tobacco and also had no orifice made for the insertion of the pipe stem, and could not be used as pipe bowls or smokers' articles in their incomplete condition as imported.

*Held:* The articles are shaped like pipe bowls and have been so far advanced in manufacture as probably to be unfit for any other purpose than pipe bowls.

\* \* \* \* \*

"We find that the articles in question have not been sufficiently advanced in manufacture to answer the purpose of pipe bowls or smokers' articles, and that they are not such in fact."

*United States vs. Simon*, 84 Fed. Rep. 154, C. C. U. S. S. D. New York (1807):

The question was whether India rubber tubing in meter lengths, colored, chiefly used in making stems of artificial flowers, were dutiable as manufactures of India rubber or as parts of artificial flowers.

*Held* that they were dutiable as manufactures of India rubber, inasmuch as they were not any finished part of an artificial flower—Wheeler, District Judge, saying:

"The paragraph under which this manufacture was assessed *does not provide a duty on materials for artificial flowers but for parts of artificial flowers.* \* \* \* This tubing is not any finished part of an artificial flower, but is merely a material from which the stems, as such a part of an artificial flower, can be made. As this tubing is not a part of an artificial flower, the protest should be sustained." Decision of the Board of General Appraisers reversed.

*United States vs. Reisinger*, 94 Fed. Rep. 1002, Circuit Ct. of App., Second Circuit (1800):

The question was whether carbon sticks, 36 inches long, intended for ultimate use in electric lighting, but which required to be cut into suitable lengths, and the ends pointed or ground before they could be used, were dutiable as articles or wares composed wholly of carbon, not specially provided for, or as carbons for electric lighting.

*Held*, that, *although intended ultimately for electric lighting, the fact that it was necessary to bestow further labor on the carbon sticks in order to fit them for such use, precluded their inclusion in paragraph 98 of the Tariff Act of 1807, which imposes a certain duty upon carbons or sticks for electric lighting.* The decision of the Circuit Court to the contrary was reversed, and that of the Board of General Appraisers affirmed, which held the articles dutiable as articles or wares composed wholly of carbon, not specially provided for.

Treas. Dec. 21710. G. A. 4500, Treas. Dec. Vol. 2, page 615 (1899):

The question was as to the status of certain pieces of polished hard rubber, about four inches long, which, when divided in the centre, were to be made into mouth pieces for pipes, as dutiable as smokers' articles, or as manufactures of hard rubber under paragraph 450 of the Act of July, 1897. The lengths were shaped and polished, but, after being cut, *the pieces must be further bored and screws put in to render them suitable for smokers' use.*

*Held* that none of the goods were smokers' articles, and that they were dutiable as manufactures of hard rubber.

Treas. Dec. 32306 (Abstract No. 28004) 1012—Decision of Board of General Appraisers:

The question was as to the status of unfinished pipe mouth pieces which still had to be joined, fitted to a wooden part, threaded and polished before they were ready to be put into pipes.

*Held* by the Board that they were no more smokers' articles than would be crude rubber from which they were manufactured, and that *they were simply articles from which a smokers' article could be, and eventually would be made.*

*Hunter vs. United States*, 134 Fed. Rep. 361, C. C. A. Second Circuit (1904):

The question was whether pieces of paper, cut by machinery into certain appropriate shapes and sizes adapting them to be folded so as to constitute envelopes of desired shapes and sizes, were paper envelopes under paragraph 399 of the U. S. Comp. Stat. of 1901, or were manufactures of paper under paragraph 407 of the Act of July 24, 1897 (c. 11).

*Held* that they were not paper envelopes, but were manufactures of paper. Lacombe, Circuit Judge, saying:

"In common everyday speech the word 'envelope' is used as implying the actual case or wrapper, of paper or cloth, in which a letter or the like may be enclosed. The 'blanks' here imported have not yet become such case or wrapper, *even though they may be of such shape and size as to unfit them for other purposes.* It is still necessary to fold over the flaps, and to apply gum to the edges of some of them, and actually to stick together the side and bottom flaps. These are substantial steps in the process of manufacture."

*In re Protest of United States Express Co.*, T. D. 35697, G. A. 7771, Treas. Dec. Vol. 29, page 203—U. S. General Appraisers, New York (1915):

The question was whether *a piece of wood roughly carved into the shape and form of a pipe bowl, but incapable of such use in its then condition*, was a pipe bowl under paragraph 381 of the Tariff Act of 1913, or was a manufacture of wood under paragraph 176 of the Act.

Held, under the authority of Reiss Bros. & Co., G. A. 3495, (T. D. 16077), that the article was not a pipe bowl but a manufacture of wood.

*American Express Company's case*, Abstract 33385, T. D. 33695 (1913) before the Board of General Appraisers:

*Meerschaum blocks which have to be shaped before using as smokers' articles, were held to be dutiable as meerschaum, crude or manufactured, and not as smokers' articles.*

*Protest of Benedict Weiss*, Abstract No. 38991, Treas. Dec. Vol. 29, p. 796 (1915):

The question was as to the status of pieces of wood roughly carved into the shape of pipe bowls, claimed dutiable as manufactures of wood.

*Held that the wood in question, which was found not to have been sufficiently advanced in manufacture to answer the purpose of a pipe bowl, was not a pipe bowl under the Tariff Act, but was dutiable as manufactures of wood under paragraph 176 of the Act.*

*Parts of Musical Instruments*, T. D. 27207, G. A. 6312 (1906) before U. S. General Appraisers Lunt, Sharretts and McClelland:

The question was as to the status of articles consisting each of three sections of granadilla wood, rough turned and bored, two of which sections were tubular in form,  $1\frac{3}{8}$  inches in diameter by 3 feet 11 inches in length, respectively. The third section was bell-shaped—the three pieces being designed for use in the manufacture of clarinets. Duty was assessed upon the merchandise at a certain rate under the provisions of paragraph 453 of the Tariff Act of 1897, as parts of musical instruments. The importers claimed that the articles were dutiable at 35 per cent. ad valorem under paragraph 208 of the Act, as manufactures of wood.

*Held as follows:*

"The disputed articles are in the nature of materials intended to be made into musical instruments, but in their rough condition as imported they certainly are not parts of such instruments. *It is doubtful if any but completed parts which require only assembling to make them musical instruments, or are intended to supply a missing part thereof, would be included in this paragraph.* (Paragraph 453 of the Tariff Act of 1907)."

*Fenton vs. United States*, (1911) 1 U. S. Cust. Appl. 529:

*Held* the term fishing tackle does not include a rod, reel, hook or float that is not in finished condition, ready for the angler's use, and the term "parts thereof" must refer to the

completed article, whatever it be, that is also ready for use, either alone or in connection with other articles of the angler's outfit.

*Redden & Martin vs. United States* (1915), 5 U. S. Cust. Appls., 485, 480.

*Held* only when a tariff act specially makes subject to duty articles whether *unfinished* or finished or *partly manufactured*, as well as manufactured articles, will commodities be subject to duty in their unfinished or partly manufactured state.

### 3. THE ERROR IN THE RULING OF THE COURT THAT THE PETITIONER WAS A PERSON MANUFACTURING A PART OF A SHELL, ALTHOUGH THE PROCESSES CONDUCTED ON THE MATERIAL LEFT IT WHOLLY UNFIT FOR THE PURPOSES IT WAS ULTIMATELY INTENDED TO SUBSERVE.

The distinction here is between a *manufactured* and a *partly manufactured* article.

That the material here involved was merely a *partly manufactured article*, and not a *part manufactured*, and that therefore the petitioner was not a person manufacturing a part of a shell, the following cases, as we claim, conclusively show. They establish that the fundamental idea of a manufactured article is that it must be so nearly completed as to be serviceable for the purpose for which it was designed.

#### THE CASES:—

In *United States vs. Potts*, 9 U. S. 284 (1809), the question was whether round copper plates, turned up at the edge and intended to be made into cooking utensils, were manufactured articles or raw copper.

Chief Justice Marshall says (page 287):

"From the facts stated, the copper in question cannot be deemed manufactured copper, within the intention of the legislature."

In *Lawrence vs. Allen*, 48 U. S. 785 (1849), the question was whether certain rubber imported was manufactured or unmanufactured India rubber. It appeared that it was customary to dip crude clay models, representing a bottle or shoe, or something of that kind, in the sap of the tree and by evaporation let it harden and then, by breaking out the clay, one would have a crudely shaped shoe or bottle, or something of that kind, and that it was the habit of importers in the United States to import rubber in this shape, which they used in subsequent manufacture of articles, including India rubber shoes, which were made to suit the American and European markets in entirely different ways, and which involved the remelting of the rubber shoe, which was imported, and using it simply as a raw material. It appeared, however, from the evidence, that the India rubber shoes imported were in a condition that they could be worn without further labor upon them and were made for the purpose of being worn and were often actually worn in this form. It was held that they were dutiable as India rubber shoes because they were a completely manufactured article, and the fact that it might suit some manufacturers' convenience to use them as a raw material was not controlling.

Justice Woodbury says (page 794) speaking of the more modern idea attached to the word manufacture.

\* \* \* "it is making an article, either by hand or machinery, into a new form, capable of being used, and designed to be used, in ordinary life."

He says again (page 794):—

\* \* \* "it is manifest that the India rubber is not meant to be taxed as a manufacture, though so hardened and changed, unless, at the same time, it is put into a shape which is suitable for use, and adapted with a design to be used in a way that is calculated to rival some domestic manufacture here, rather than merely to furnish a raw material in a more portable, useful and convenient form for other manufacturers

here. In the latter case, within the policy and purpose of the tariff law yielding protection, it is 'unmanufactured,' or, in other words, not made abroad for use in its existing form except as a raw material, like pig iron or pig lead. But in the former case, within that policy and purpose, it is 'manufactured' as it is made in a shape for use as a manufacture *without being afterwards materially changed in form*, and is designed to be so used, and hence comes in as a competitor with our own manufacture."

*Hartranft vs. Wiegmann*, 121 U. S. 609 (1886), is considered the leading case upon this subject. The question was whether the sea shells, there imported (upon which certain ornamental designs had been etched or carved), were still sea shells and came in free, or whether they were manufactured shells and subject to duty.

Justice Blatchford says (page 615):—

"They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell."

*Dejonge vs. Magone*, 150 U. S. 562 (1895), was a case involving the manufacture of paper.

Justice White says (page 568):—

"There was no such change of form as in the case of paper screens, paper boxes, paper envelopes, and other like manufacture of paper."

In *Anheuser-Busch Brewing Association vs. United States*, 207 U. S. 556 (1907), Justice McKenna says (page 562):—

"There must be transformation; a new and different article must emerge, 'Having a distinctive name, character and use.'"

*United States vs. Semmer*, 41 Fed. 324 (1890), Circuit Court, S. D. New York, was a case which involved the

question of whether the glass imported was completely manufactured.

Judge Lacombe says (page 326):—

"\* \* \* the mere fact of the application of labor to an article, either by hand or by mechanism, does not make the articles necessarily a manufactured article, within the meaning of that term as used in the tariff laws, unless the application of such labor is carried to such an extent that the article suffers a species of transformation, and is changed into a new and different article, having a distinctive name, character or use. \* \* \*

"*The labor bestowed upon the article is to be continued to such an extent as to transform it into a new and different article commercially, having a distinctive name in commerce, having a distinctive character commercially, or having a distinctive commercial use.*"

*Erhardt vs. Hahn*, 55 Fed. 273 (1893), C. C. A. Second Circuit, was a case which involved duties upon agate and other semi-precious stones, cut, ground and polished into the shape and for the uses, respectively, as penholder handles, knife handles, button-hook handles, etc. The Court held that they were not manufactured articles.

The Court says (page 275):—

"It has been repeatedly decided, under the tariff acts, that where an article has been advanced through one or more processes into a *completed* commercial article, known and recognized in trade by a specific and distinctive name, other than the name of the material, and is put into a *completed* shape designated and adapted for a particular use, it is deemed to be a manufacturer."

In *Smith vs. Rheinstrom*, 65 Fed. 984 (1895), C. C. A., Sixth Circuit, Judge Taft uses this language (page 986):

"What we have to decide is whether its qualities are such as justify to prevent its being taxed as the thing from which it is made. This must depend, of course, upon the amount of change to which the original article has been subjected to make the new article. It is a question of degree."

In *Robertson vs. Gerdau*, 132 U. S. 454 (1889), the question involved was whether pieces of ivory, for the keys of pianos and organs, are musical instruments.

Justice Blatchford says (page 459):—

*"It is very clear to us that the fact that the articles in question were to be used exclusively for a musical instrument, and were made on purpose for such an instrument, does not make them dutiable as musical instruments."*

In *Worthington vs. Robbins*, 139 U. S. 337 (1890), the question was what duty should be imposed upon white hard enamel imported for the purpose of making watch dials.

Justice Blatchford uses this language (page 338):—

\*\*\* \* in the form or condition as imported, it cannot be used for any of the purposes above described, nor for any purposes whatever of practical use to which it is adapted or ever applied and that, *before it can be applied to any practical use*, its present form and condition must be changed by grinding or pulverizing, and new processes of manufacture applied."

*Saltonstall vs. Wiebusch*, 156 U. S. 601 (1894), was a case which involved the question of whether carpenters' pinchers, scythes, and grass-hooks, made of forged steel, were taxable as forgings of iron and steel, or manufactures composed of iron and steel. The Court held that they were not taxable as forgings, although they were made by forging, because there were two additional processes after the forging, to wit (1) tempering and (2) grinding.

Justice Brown says (page 603) :—

"But we do not understand the term 'forgings' to be applicable to articles which receive treatment of a different kind than hammering before they are complete; such, for example, as grinding, tempering, or polishing."

*Tidewater Oil Co. vs. United States*, 171 U. S. 210 (1897), is quite a leading case and is known as the "Box Shook Case."

The Court observes (page 217) :—

"\* \* \* the finished product of one manufacture thus becoming the material of the next in rank."  
\* \* \*

"It is not always easy to determine the difference between a *complete* and a *partial* manufacture, but we may say generally that an article which can only be used for a particular purpose, *in which the process of manufacture stops short of the completed article* can only be said to be *partially manufactured* within the meaning of this section."

Again (page 218) :—

"It may be said generally, although not universally, that a *complete* manufacture is either the ultimate product of prior successive manufactures, such as a watch spring, or a penknife, or an intermediate product which may be used for different purposes, such for instance as pig iron, iron bars, lumber or cloth; while a *partial* manufacture is a mere stage in the development of the material toward an ultimate and predestined product, such for instance as the different parts of a watch which need only be put together to make the finished article."

*Allen vs. Smith*, 173 U. S. 389, and *Burdon Central Sugar Refining Co. vs. Payne*, 167 U. S. 127 (1896),

known as the Sugar Bounty Cases, are illustrative of the same proposition, where it was held that the man who completed the manufacture of sugar was the one who was entitled to the bounty.

In *Allen vs. Smith*, Justice Brown says (page 399) :—

"In a number of cases arising in this Court under the revenue laws, it is stated that the word 'manufacture' is ordinarily used to denote an article upon the material of which labor has been expended to make the *finished product*. \* \* \*

(Page 400) :—

"So the one who raises the cane is undoubtedly entitled to be considered the producer of the cane, but he is not the producer of the sugar. *That appellation is reserved for him who turns out the finished product.*"

Again (page 401) :—

"To return to the illustration of manufacture. Can it be possible that, if a bounty were offered for the manufacture of furniture, the manufacturer of the finished product would be obliged to share such bounty with the owner of the trees, or the manufacturer of the lumber cut from such trees, from which the furniture was made? Or, under similar circumstances, would the manufacturer of watches be compelled to share the bounty with the score of prior manufacturers who contributed directly or indirectly to the production of the various articles of mechanism which go to make up the finished watch? To state this question is to answer it."

In *Schoverling vs. United States*, 142 Fed. 302 (1906), C. C., Southern District, New York, before Judge Hazel,

it was held that certain India-rubber pads for guns were not dutiable as shotguns or parts of shotguns.

*Norris vs. Pennsylvania*, 27 Pa. 494 (1896), involved the question of whether iron in form and size fitted and designed for locomotive engine tires, with flanges, so as to require only to be cut the proper length, turned, welded and adjusted, to the cast iron wheels, were parts of a locomotive. Justice Black uses this language (page 496):—

"To make in the mechanical sense does not signify to create out of nothing; for that surpasses all human power. It does not often mean the production of a new article out of materials entirely raw. It generally consists in giving new shapes, new qualities, or new combinations to matter which has already gone through some other artificial process."

*In re First National Bank of Belle Fourche*, 152 Fed. 64 (1907), C. C. A. Eighth Circuit,

Judge Brown uses this language (page 67):—

"\* \* \* it produces a new and useful article, a bridge, when by the application of skill and labor to the materials of which it is comprised it constructs it."

*In Central Trust Co. vs. Lueders*, 221 Fed. 829 (1915), which was affirmed by the Circuit Court of Appeals, Sixth Circuit, Judge Knappen says (page 838), quoting Mr. Justice Brown, that the word "manufacture,"

"is now ordinarily used to denote an article upon the material of which labor has been expended, to make the *finished* product."

And again, quoting Mr. Justice Field:—

"Manufacture is transformation, the finishing of raw material into a change of form or use."

In *Vandergrift vs. United States*, 164 Fed. 65 (1908), Circuit Court, E. D. Pa. (a tariff case) Judge McPherson says (page 69), quoting with approval the General Appraiser in *In re Eckstein*, G. A. §822:

"These decisions amply support the proposition that, in order to constitute a manufactured article, the processes of manufacture devoted to it must be so far completed as to render the article ready for common use, known and designated by a common name, *without additional processes of manufacture.*"

In *United States vs. Thomas Prosser & Son*, 177 Fed. 569 (1910), Circuit Court S. D., New York, Judge Martin uses this language (page 571):

"As I construe these two paragraphs, it is a question of fact as to whether these articles, after having been forged, were so far developed by a finishing process that they have been advanced from the condition of a forging to that of a manufactured metal."

In *Bromley vs. United States*, 156 Fed. 958 (1907), Circuit Court of Appeals, Third Circuit, Judge Buffington concludes (page 959):

"In view of the careful work thus expended on them to fit them as parts of valuable machines, we are clear their character as mere castings had merged into the higher mechanical plane of a manufactured article."

#### 4. THE DISTINCTIONS MADE BY THE COURT BELOW.

It was unequivocally admitted by both of the courts below (Transcript, pages 154, 184-185), that the customs tariff cases define the words we have been considering according to our contention.

Two distinctions were however set up to avoid their application to the case in hand:

*First*, that the meaning of the words in the customs tariff cases ought not to be extended to the same words in internal revenue cases because of supposed differences in the two classes of revenue laws. And

*Secondly*, that the tax in question was laid upon the business of manufacturing as distinguished from one laid upon articles as such, and that, therefore, all engaged or connected with the manufacture of munitions of war, and deriving a profit therefrom as manufacturers, were hit by the statute.

These distinctions will briefly be considered in their order.

*As to the First Distinction:*

It was said that the settled definitions of the words in the customs tariff cases cited are of no significance in this internal revenue case because the purpose of the customs tariff legislation was to encourage and protect domestic industry, and that those definitions must therefore be understood as limited in their application to cases arising under such legislation, and cannot be extended beyond them to cases where the "tariff for protection" theory does not apply.

We point out, in answer to the above:

(a) That the cases fixing the meaning of the word "part" in a composite article run back well into the era of the prevalence of the "tariff for revenue" doctrine, and that in no case has it been asserted, or made a *ratio decidendi* that the meaning of the word is to be determined with a view to having it fit in with any "tariff for protection" view.

See the early case of *United States vs. Thirty-one Boxes*, 28 Fed. Cases 56 (1833), arising under the Tariff Act of 1824, above cited (p. 15).

The ground of the decision was that the natural meaning of the word "link" as related to a chain, of which the ma-

terial when finished was destined to become a part, excluded the material in an unfinished condition from being adjudged a "part" of the chain—for the reason that a part "denotes a portion taken from the whole and still retaining the properties of the whole, less only the extent."

In none of the later cases where the word "part" has come up for interpretation, so far as we have been able to find, has anything but resort to the natural meaning of the word been found necessary to interpret it—excepting only when Congress in terms or by implication, in enacting any particular statute, divorced the word from its natural meaning. This is in accord with the settled doctrine that the natural, obvious meaning must be given to the language of a statute where there is no ambiguity in it. *Bate Refrigerating Co. vs. Sulzberger*, 157 U. S. 1, 36.

(b) We further point out that the appellate Court was wholly in error in its assumption that the meaning of the word we are considering was fixed for it exclusively in the customs tariff cases, and that that meaning must be confined to such cases. See *Burdon Central Sugar Refining Co. vs. Payne*, 167 U. S. 127, and *Allen vs. Smith*, 173 U. S. 389.

In the latter case a contest arose as to which of two parties was entitled to the sugar bounty given to the producer of sugar—the grower of the cane or the man who produced or manufactured the finished sugar. Obviously, with that the contest, and neither the United States nor one of its Collectors a party, the occasion presented itself for definition of the words "manufacture" and "manufacturer" free from any theory of interpretation based upon customs tariff policies. Both the contestants were claiming the bounty, and it belonged to one or the other, and discussion of the theory of the Bounty Act, much less of the Customs Tariff laws, was unnecessary in arriving at the meaning of the words defined.

This Court, however, resorted to the customs tariff cases for a definition of the words, and ruled the case upon their authority. We have quoted certain language used by

Mr. Justice Brown in the above case at page 28, *supra*, and refer to it at this point.

The case of *Tidewater Oil Co. vs. United States*, 171 U. S. 210, involving a claim of right to a drawback under the provisions of R. S. 3019 (Comp. Stats., p. 6829), cannot properly be treated, as the appellate Court in its opinion treated it, as if it decided that only where encouragement to domestic manufacture is involved in the purpose of a statute must the word "manufacture" be confined to the finished article. The language of the Court quoted at page 27, *supra*, in this brief, clearly shows that the Court intended to recognize and did recognize and adopt as of general application the distinction between a *partial manufacturer* and a *manufacture or complete manufacturer*.

In cases which have arisen under the bankruptcy or insolvency laws, the definitions in the customs tariff cases have also been followed and applied, thereby further showing the general application of the definitions fixed by those cases.

See in re *Rheinstrom & Sons Co.*, 207 Fed. 119, 130, 135, 136 (1913). *Central Trust Co. vs. Lueders*, 221 Fed. 820, 838 (1915).

#### *As to the Second Distinction:*

While it is true that the tax is upon profits derived from the business of manufacturing and is specifically laid upon every person manufacturing, it *nowhere appears in the statute that all persons doing work as manufacturers upon material intended for and subsequently entering into munitions of war, and deriving a profit therefrom, are subject to the tax.* The Act, after naming a number of articles constituting its subject-matter, plainly declares that the tax shall be paid from the net profits received or accrued "from the sale or disposition of *such articles*," and shall be paid by every person *manufacturing any of such articles or any part of any of the articles*.

There is clearly here as definite as possible a limitation of the reach and scope of the Statute to those persons who manufacture the *articles specified or any part of any* of them.

The statute was never meant to tax one who performed but part of the work essential to producing a single one of four distinct parts of the completed shell.

It follows therefore that no person whose product is not one of the manufactured articles specified, or a manufactured part of any of them,—as the word "manufacture," (as meaning a completed fabrication), and as the word "part," (as meaning a completed part), had been defined for the lawmakers in countless decisions—can possibly be within the statute's reach.

The trial Judge (whose language was adopted by the appellate Court), as we believe erroneously, said: "The clear purpose of the Act is, through taxation of the business or occupation of manufacturing munitions of war to reach the profits of all those engaged in such manufacture, whether engaged in manufacturing to completion *or engaged in any part of such manufacturing.*"

If that were the purpose of the act it would follow that it was intended to reach every manufacturer whose material goes into munitions. But, as pointed out by Judge Thomson, of the Western District of Pennsylvania, in his Opinion in the *Forged Steel Wheel Co.* case (see Transcript of record in that case, page 286) Congress definitely rejected a second section of the Act originally introduced proposing to tax the material entering into and used as a component part of the articles selected for taxation.

We have already shown, however, that it is not the purpose or intent of the act which controls. Whatever may be conceived to have been the Congressional intent, it is the language of the act actually used by the lawmakers to carry out whatever purposes they had that must govern.

The meaning of the essential words in it which we have been considering having been settled, and Congress, in enact-

ing them, having also with them enacted their meaning, the contrary meaning which the Court below has found in them, it is submitted, must necessarily be excluded.

**5. ROUGH SHELL FORGINGS ARE NOT "PARTS" OF SHELLS ACCORDING TO THE TREASURY DEPARTMENT'S OWN DEFINITION OF THE WORD "PART," IN CONSTRUING THE REVENUE ACT, AND CERTAIN OF ITS RULINGS THEREUNDER.**

In Article XIII of Treasury Decision 2384 (See Stipulation of Agreed upon Facts, Record, pages 33-34), the Commissioner of Internal Revenue, defining the word "part," says:—

"Any part thereof" as used in Section 301 of this Title is any article *relatively complete* (italics those of the Commissioner himself) within itself, and designed or manufactured for the special purpose of being used as a component part of a completed munition, and which, by reason of some peculiar characteristic, loses its identity as a commercial commodity, and which, without further treatment, cannot be used for any purpose other than that for which it was designed."

The Commissioner, in the italicized portion of the above language (his own italics), has himself fixed the point in the stage of its manufacturing development at which material designed to go into a munition, becomes part of the munition itself. It must be *relatively complete*. By "relatively complete" is, of course, meant complete as related to the other parts with which it is to be associated by assembling or attachment, and also as related to the munition as a whole. In other words, to be "relatively complete," the article must be so developed at the stage when its status comes up for consideration, that in its then form as well as substance, quantitatively and qualitatively speaking, it can be physically related to and combined with other articles to form the composite thing known as a munition. The words "relatively complete" do not mean *partially* complete. The

words "relatively" and "partially" convey different ideas. Nor do the words mean *approximately* complete or *substantially* complete. It is the idea of relativity to other parts that the word conveys. The Commissioner's entire phrase is "relatively complete within itself." The words "complete within itself," as descriptive of an article, mean nothing whatever as bearing upon the present inquiry. Every article, however crude and undeveloped is complete within itself as an *article*. It is only when the significance of the word "relatively" is taken into account in association with the word "complete" that the whole phrase carries a concrete or, indeed, any definite meaning. Then it becomes a real, living phrase, with the idea central in it that the thing under definition must have a completion, related, in respect of its degree of finish, to the things to which it is to have a relation by juxtaposition or combination of parts, so that all the parts can, and at that time, be associated together, to carry out the ultimate, practical purposes of the manufacture. This means, of course, in the case of a shell, that, for a rough forging intended to be developed into a body for a shell to be regarded as a "part" of a shell, it must, when it comes up for consideration as a shell body, be developed to the extent that the copper band can be put upon it, that the fuse can be screwed into its nose, and that, when these parts are associated with it in its then stage of development, the loading charge can be placed inside of it, and it can then be fired as a shell. To contend that that could be done with the rough forgings involved in this case, in the condition in which they were when delivered by the petitioner to Midvale, is to contend for a palpable absurdity.

The idea of relative completeness as a necessary feature of the article, runs through the whole of Article XIII of the Treasury Decision we are considering. The Commissioner excludes from "parts" of munitions, stock or commercial commodities purchased in the general trade or open market, unless "they are manufactured specially for, and sold to a manufacturer to be, by him, incorporated in and

made an essential part of any munitions." But even as to stock or commercial commodities so specially manufactured and sold, the article must be *relatively complete*, that is, complete as related to the thing of which it is to constitute a part. The fact that the article is designed and specially manufactured to go into a munition, does not make the article a "part." Iron ore may be dug from the ground, developed into pig iron in the blast furnace, manufactured into ingots in the open hearth furnace, sliced into billets, pierced, and drawn into particular shapes, with the definite purpose in view, through all the processes, to have the material made ultimately available for incorporation into and made an essential part of any munitions. It could not, however, be contended that the material back to the ore stage is a "part" of the munition into which it subsequently goes. Such a contention would be equivalent to the claim that Congress, in establishing the Munitions Manufacturers Tax and imposing a tax upon the profits derived from the manufacturer of "parts" of munitions, intended to use the word "part" as equivalent to "ingredient." While it is true, in a sense, that every unit of matter entering into a shell, is a part of the shell in the sense that it is one of the ingredients of the shell, it is not in that sense that the word "part" was used in the tax statute. If that were the case, it would follow, as above pointed out, that all the materials composing the shell, back as far as the ore when dug from the ground, must be considered as "part" of the shell.

It is quite clear why the Commissioner, in his decision, treats a stock or commercial commodity as part of a shell, if manufactured specially for and sold to a manufacturer who subsequently incorporates it as an essential part of a shell. Such stock commodity is, of course, a part of a shell *if, as and when sold to the munition manufacturer, it can, without material change in it, be used as a part*, and the manufacturer of the stock commodity ought not to be relieved from the munitions tax upon it as it goes into the shell merely because it could also be used for some general

commercial purpose other than for use in the manufacture of a shell. The article, however, as above shown, must be a *relatively complete* article, practically ready to be combined with other articles as and when sold, to make up the shell, or it can not be treated as a "part" of a shell. Otherwise the munitions tax would not be what it purports to be, namely, a tax on munitions and parts thereof, but a tax on the materials entering into munitions.

Certain later rulings of the Commissioner of Internal Revenue are most pertinent in this connection.

Section 600 (f) of the Act of October 3rd, 1917, 40 Stat. 316; U. S. Compiled Stat. 1918, Compact Edition Sec. 6309 3 4a, imposes an excise tax of three per cent. "upon all \* \* \* golf clubs \* \* \* games and parts of games." The Commissioner in Treasury Decision 2547, of October 26th, 1917 (see Corporation Trust Company's War Tax Service 1917, pp. 1207-1208) rules upon the following question:

*Question:* "In the case of parts of golf clubs sold to golf professionals in the rough, that is iron heads, wooden heads, leather straps for handles and shafts and these separate parts are assembled by the professional and the completed club sold by him, who is the manufacturer of the golf club and when is this tax payable?"

*Answer.* "'Iron heads, wooden heads' etc. are not golf clubs, neither are they parts of games within the meaning of the statute. *The one who produces the finished product is the manufacturer and is charged with the tax.*'"

Section 600 (g) of the Act imposes a tax of two per cent. upon manufacturers of certain compounds intended to be used and applied for toilet purposes. Deputy Commissioner G. E. Fletcher, in a letter to Alexander, Cohn & Sondeheim, dated November 14th, 1917, (see War Tax Service, 1917, p. 1215) ruled as follows:

"You are advised that where goods manufactured by a person require further manufacture before being used by the consumer, *the one completing the manufacture is liable for the tax.*"

**6. THE ACT, WHEN ITS ESSENTIAL WORDS ARE GIVEN THE INTERPRETATION FOR WHICH WE ARE CONTENDING, HAS A NATURAL APPLICATION TO A GREAT NUMBER OF COMMODITIES, AND NO NECESSITY EXISTS FOR EXTENDING THE MEANING OF THE WORDS, BY ANY DOUBTFUL CONSTRUCTION, WITH A VIEW TO FINDING SUBJECTS FOR ITS OPERATION.**

The act was considered mainly by the court as if it meant to tax profits derived only from shells or projectiles and their parts; whereas it included also profits from cartridges, torpedoes, small arms, cannon, machine guns, bayonets, motor boats, and submarines, and their parts. It is a matter of common knowledge that all the above articles have definite parts—some of them many parts—which are completed in finished form and supplied in the trade to manufacturers of the composite articles, and are also manufactured by munition makers themselves as independent parts and supplied to dealers and other manufacturers.

If the reasoning and conclusion of the Circuit Court of Appeals in this case are sound, then it is just as logical to conclude that a person or firm manufacturing the leather or the felt from which a motor boat cushion is made is a manufacturer of a part of a motor boat, and consequently subject to the tax.

The following list is significant:

*List of Distinct Parts of Various Kinds of Articles Mentioned in Section 301 of Title III of the Act of September 8th, 1916, Which Are Commonly Recognized as "Parts" for Assembling or Sale Purposes, and Manufactured and Known in the Art and Trade as Such.*

The various articles mentioned in the above Section are well known respectively to have the following separately purchasable parts:

**CARTRIDGES:**

- Cartridge case;
- Primer;
- Powder;
- Wad, if any;
- Projectile.

**TORPEDOES (Automobile variety):**

- War head;
- Practice head;
- Explosive charge;
- Air flask;
- Air flask head;
- Alcohol lamp;
- Propelling engine;
- Obry gyroscopic gear;
- Many screws.

**SMALL ARMS—**

**SHOT GUN:**

- Barrel;
- Sight;
- Hammer;
- Firing pin;
- Firing pin spring;
- Fore end;
- Trigger;
- Trigger spring;
- Stock;
- Heel plate;
- Lever;
- Lever spring;
- Main spring;
- Bolts;
- Many screws.

**RIFLE (Repeating) :**

Barrel;  
Sight;  
Magazine;  
Magazine spring;

**BAYONETS:**

Parts probably never sold singly to the consumer,  
but consisting usually of a blade; two wooden  
handle parts; burs and rivets.

**ELECTRIC MOTOR BOAT:**

Hull;  
Motor;  
Shafting;  
Bearings;  
Propeller;  
Propeller nut;  
Rudder;  
Storage batteries;  
Steering wheel;  
Tiller ropes;  
Tiller;  
Tiller rope pulleys;  
Reostat;  
Controller;  
Electric wiring;  
Anchor;  
Hawser;  
Side lights;  
Riding lights;  
Water tanks;  
Construction and trimming hardware;  
Fittings, such as  
Cushions;  
Lavatory fixtures;  
Galley stove;  
Refrigerator;  
Cooking equipment;  
Bunks and their equipment;

Signals;  
Compass;  
Repair tools.

**SUBMARINE BOAT:**

All parts listed for electric motor boats, and in addition  
 Magazine follower;  
 Bolt;  
 Firing pin;  
 Firing pin spring;  
 Extractor;  
 Carrier;  
 Carrier spring;  
 Finger lever;  
 Main spring;  
 Trigger;  
 Trigger spring;  
 Fore end;  
 Fore end cap;  
 Receiver;  
 Locking bolts;  
 Locking bolt pin (male);  
 Locking bolt bushing;  
 Stock;  
 Heel plate;  
 Many screws.

**REVOLVERS AND PISTOLS:**

Many parts, as in the case of rifles and shot guns.

**CANNON:**

Gun proper;  
 Breech mechanism, consisting usually of  
     Breech block;  
     Mushroom;  
     Gas check rings;  
     Gas check pad;  
     Mushroom nuts, washers and springs;  
     Carrier;  
     Rotating gear;

Lever handle;

Hinge bolt;

Frequently many other parts.

**MACHINE GUN:**

The machine gun contains most of the parts of a rifle, and many others, chiefly connected with the automatic features.

Torpedo tubes;

Racks;

Oil engines;

Ignition system;

Oil tanks;

Camera Lucida;

Gyroscopic compass;

Steering engine;

Air pump;

Water pump;

Compressed air tanks;

Valves and fittings;

Manometers;

Pressure gauges;

Engine room signal system.

The profits derived from the sale of every one of the above parts were hit by the act. They were what were aimed at by Congress. It was a large target. The lower Court seems utterly to have ignored the existence of the above parts as the natural basis for the application of the act to "parts."

A. H. WINTERSTEEN,

CHADBOURNE, BABBITT & WALLACE,

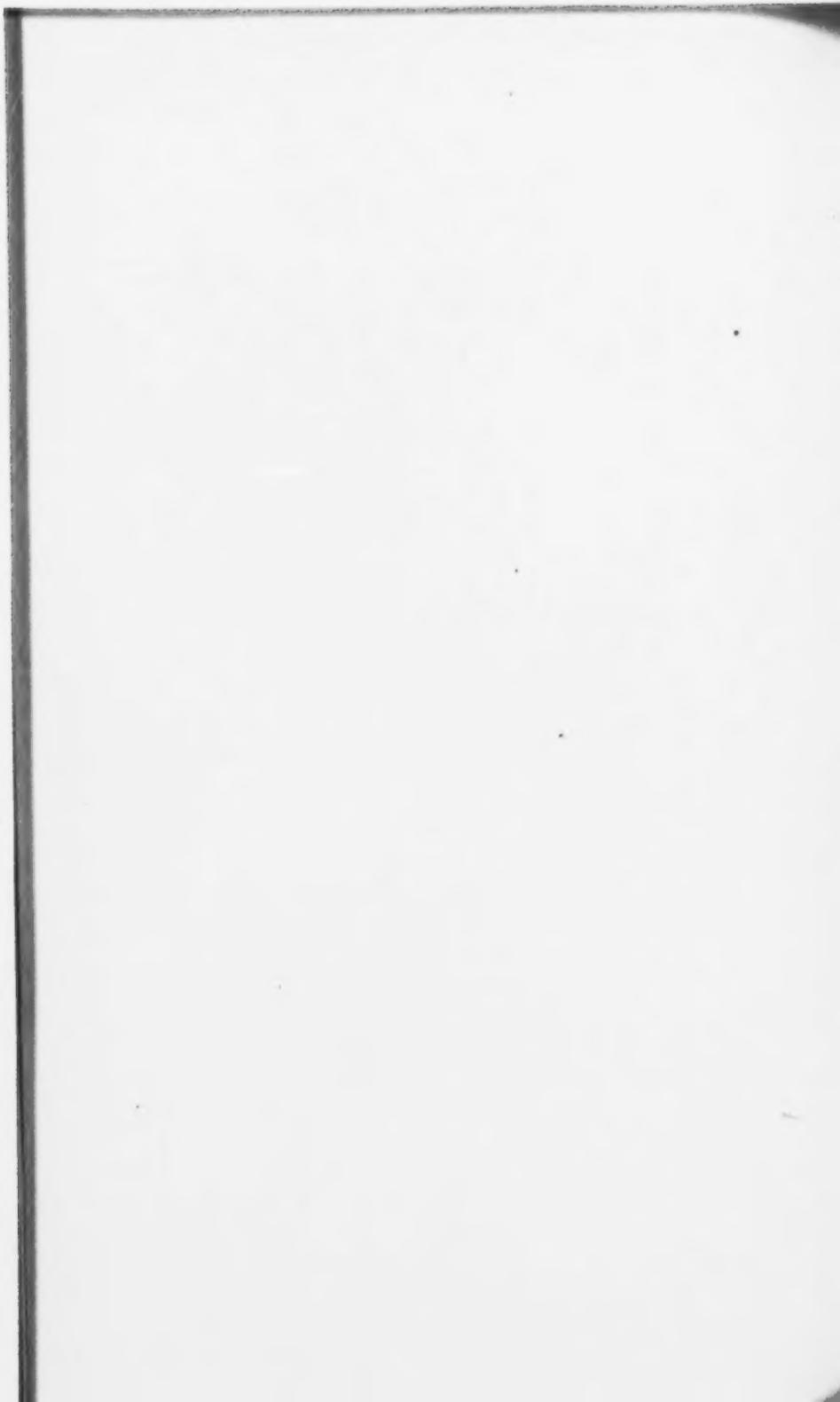
*Attorneys for Petitioner.*

## APPENDIX.

PARTIAL LIST OF CLAIMS PENDING AT DATE OF DECISION OF PRESENT CASE BY CIRCUIT COURT OF APPEALS,  
JUNE 9, 1919.

NAME OF CLAIMANT	AMOUNT OF TAX CLAIM	YEAR	MATERIAL	JURISDICTION			STATUS
				U. S. Circuit Court of Appeals	U. S. Circuit Court of Appeals	Third Circuit	
Worth Brothers Company	\$7,4857.07	1916	Rough Shell forgings			Judgment for Collector,	
Forged Steel Wheel Co.	240,920.18	1916	Rough Shell forgings			Judgment of Appeals Court	
Carbon Steel Company	271,062.62	1916	Rough Shell forgings	U. S. Circuit Court of Appeals	U. S. Circuit Court of Appeals	Judgment for Collector,	
Carnegie Steel Company	1,455,526.80	1916	Rough Shell forgings	Third Circuit		Judgment for Collector,	
Carnegie Steel Company	742,258.99	1917	Rough Shell forgings		Commissioner of Internal Revenue	Undetermined.	
National Tube Company	319,229.93	1916	Rough Shell forgings and Air Flask forgings		Commissioner of Internal Revenue	Undetermined.	
National Tube Company	71,871.51	1917	Rough Shell forgings and Air Flask forgings		Commissioner of Internal Revenue	Undetermined.	
Shelby Steel Tube Company	15,525.44	1916	Rough Shell forgings		Commissioner of Internal Revenue	Undetermined.	
The Midvale Steel Company	217,907.65	1916	Rough Shell forgings		Commissioner of Internal Revenue	Claim rejected by Commissioner.	
The Midvale Steel Company	57,174.54	1916	Rough Gun forgings		Commissioner of Internal Revenue	Suit in Court deferred awaiting allowance or disallowance of this petition and if allowed the determination of the issues by this Court.	
Midvale Steel & Ordnance Co.	16,287.03	1917	Rough Gun forgings		Commissioner of Internal Revenue	Suit in Court deferred awaiting allowance or disallowance of this petition and if allowed the determination of the issues by this Court.	

NAME OF CLAIMANT	AMOUNT OF TAX CLAIM	YEAR	MATERIAL	JURISDICTION	STATUS
Dayton Brass Castings Co., ..	18,860.83	1916	Rough Castings for Time Fuses.	District Court of United States for Southern District of Ohio. Western Division .....	Argued, and undetermined.
Dayton Bronze Bearings Co., ..	7,290.51	1916	Roughings for Time Fuses.	District Court of United States for Southern District of Ohio. Western Division .....	Argued, and undetermined.
Forged Steel Wheel Co., .....	\$107,846.84	1916	Machine Work on Rough Steel Forgings.....	Commissioner of Internal Revenue. Undetermined.	
Forged Steel Wheel Co., .....	3,316.57	1917	Machine Work on Rough Steel Forgings.....	Commissioner of Internal Revenue. Undetermined.	
Union Switch & Signal Co., .....	51,547.85	1916	Machine Work on Projectiles, Bodies of Shrapnel Shells, Steel Forgings for Rifles.....	Commissioner of Internal Revenue. Undetermined.	
Standard Steel Car Co., .....	34,323.56	1916	Rough Shell Forgings.....	Commissioner of Internal Revenue. Undetermined.	
Standard Steel Car Co., .....	13,260.71	1917	Rough Shell Forgings.....	Commissioner of Internal Revenue. Undetermined.	
Westinghouse Electric & Manufacturing Company., ..	842,671.69	1916	Machine Work on Steel Shell Bodies, Copper Driving Bands, Steel Base Plates, Nose Bushings and Forgings.....	Commissioner of Internal Revenue. Undetermined.	
Westinghouse Machine Co., ..	80,207.58	1916	Machine Work on Steel Shell Bodies, Copper Driving Bands, Steel Base Plates, Nose Bushings and Forgings.....	Commissioner of Internal Revenue. Undetermined.	
Westinghouse Electric & Manufacturing Co., .....	201,596.33	1917	Machine Work on Steel Shell Bodies, Copper Driving Bands, Steel Base Plates, Nose Bushings and Forgings.....	Commissioner of Internal Revenue. Undetermined.	
Curtis & Company Manufacturing Company., .....	260,860.79	1916	Rough Shell Forgings.....	Commissioner of Internal Revenue. Undetermined.	
Curtis & Company Manufacturing Company., .....	152,473.06	1917	Rough Shell Forgings.....	Awaiting decision before filing claim.	



AUG 30 19

JAMES D. MAH

No. 525

IN THE

Supreme Court of the United States

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OCTOBER TERM, 1919.

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WORTH BROTHERS COMPANY, Petitioner,

vs.

EPHRAIM LEDERER, Collector of Internal Revenue for  
the First District of Pennsylvania, Respondent.

---

PETITION OF WORTH BROTHERS COMPANY FOR WRIT OF  
CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN  
SUPPORT THEREOF.

---

A. H. WINTERSTEEN,

MORRIS BUILDING, PHILADELPHIA, PA.,

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14 WALL STREET, NEW YORK,

*Attorneys for Petitioner.*



# In the Supreme Court of the United States.

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OCTOBER TERM, 1919.

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*Worth Brothers Company, Petitioner,*

vs.

*Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, Respondent.*

---

PETITION OF WORTH BROTHERS COMPANY  
FOR WRIT OF *CERTIORARI* TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR  
THE THIRD CIRCUIT.

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To the Honorable, the Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of *certiorari* to review the judgment of the Circuit Court of Appeals for the Third Circuit, and shows:

On October 7th, 1918, the petitioner, as plaintiff, brought an action at law in the District Court of the United States for the Eastern District of Pennsylvania against Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, to recover \$74,857.07, the amount of certain excise taxes exacted of the petitioner and paid by it under protest, which taxes were assessed for the calendar

year 1916 under Section 301 of Title III of the Act of Congress of September 8th, 1916, 39 St. 756, 780, reading as follows:

"That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d) or (e); shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half percentum upon the entire net profits actually received or accrued for said year from the sale or disposition of such article manufactured within the United States."

"The petitioner had a large plant at Coatesville, Pennsylvania, where it was manufacturing steel products of various kinds. Upon orders received from The Midvale Steel Company (hereinafter called Midvale)—a corporation of the State of Pennsylvania, and then having a contract with the French Republic for the manufacture, sale and delivery to that Government, of high explosives—the petitioner in 1916 made for Midvale certain shell forgings which Midvale needed for said contract.

"The *essential questions involved*, under the above statute, as related to the facts in the present case, are purely questions of law, and are, in brief, these:

"(1) Were these forgings as made by petitioner and sold to Midvale, shells or any part of shells within the meaning and intendment of the Act?

"(2) Was the petitioner a person manufacturing shells or any part of shells?"

These forgings were rough cylindrical bodies, closed at one end and wide open at the other, developed by the petitioner from the ore stage by six different processes, to a stage on their way to completed shell bodies, which stage, when they finally passed out of petitioner's hands, was 29 stages short of completed shell bodies. The shell body, moreover, was but one out of four distinct parts constituting the completed shell, and the work performed by petitioner was but one-fifth of the total work required upon this one of such four essential parts, to prepare it for assembling with the other parts into the completed shell.

The trial Judge found (*a*) that these shell forgings as made by petitioner were shells or parts of shells within the meaning of the above statute, and (*b*) that petitioner was a person manufacturing shells or parts of shells within the meaning thereof, and he therefore sustained the tax. (See Transcript of Record, page 142; 256 Fed. Rep. 116.) The judgment entered for the defendant Collector from whom the petitioner sought the refund was affirmed by the Circuit Court of Appeals for the Third Circuit on June 9, 1919 (Transcript of Record, page 170).

With these later stages of further production and the processes involved in them, which were all performed by Midvale, the petitioner had nothing to do. These *later* processes included the following, as found: Cutting to proper length; lathing and boring to proper inside and outside diameter; forging to produce the ogival head (otherwise called nosing in); annealing; hardening; machining to proper contour; machining and hard finishing the threads at the nose and shoulder and thread within; finishing, sand blasting, and other processes to render the surface smooth and clear of scale and roughness. They involved, among other things, material reductions in the outside diameter and the length of the shell forgings; increase in the inside diameter; and very substantial reduction in weight—in the

case of the 220 m/m forgings from 351 pounds to 160 pounds. The tensile strength of the metal as delivered by the petitioner was increased by Midvale from 85,000 pounds to a minimum of 113,750 pounds. The work performed by Midvale on this single *part* of the shell represented 60 per cent. of the cost of the completed shell bodies, and such single part was but one out of four distinct parts essential to the completed shell. The petitioner's work upon the material from the ore stage amounted to only 40 per cent. of the cost of such completed shell body.

The shell forgings supplied were intended for development by Midvale into shell bodies—the *shell body*, AS FOUND BY THE TRIAL JUDGE, being *one of four distinct parts* of the completed shell of the French type, the other parts being the *copper driving band*, the *nose timing fuse*, and the *high explosive charge* or content. The composite structure became a practicable shell only when the parts were assembled together after elaborate and complete fabrication, and the parts of the shell were capable of association with other parts only after themselves being completely or substantially in a finished condition. But no such assembling could have been successfully attempted, with the shell forgings in the condition in which they were when delivered by petitioner to Midvale.

Upon the net profits derived from the sale of the above forgings, as shown in the petitioner's Return, a tax of twelve and a half per centum was imposed, as upon profits received from the sale or disposition of articles included within the scope of the Act.

The action in the Court below was to recover the above tax after the usual course was taken of submitting to the Commissioner of Internal Revenue a Claim for Refund, and it being rejected. The case was tried in the District Court upon an Agreed Statement of Facts, and upon certain evidence given in explanation of the product and processes of manufacture—a jury trial being waived.

With the petitioner's case in the Circuit Court of Appeals there was argued another case in which precisely the opposite conclusion had been reached, to wit, the case C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Plaintiff in Error, *vs.* Forged Steel Wheel Company, Defendant in Error, brought on writ of error from a judgment in favor of that corporation in the District Court of the United States for the Western District of Pennsylvania, after trial before District Judge Thomson, on January 2nd and 3rd, 1919. That case was essentially identical with the petitioner's case, excepting that it involved material fabricated for incorporation into shells of a smaller size. The trial Judge gave binding instructions for the plaintiff, whose position was like the position of your petitioner upon the issues, and, in an Opinion on the defendant's motion for a new trial subsequently filed, definitely found for the plaintiff, holding that the plaintiff was not a person manufacturing shells or any part of shells within the meaning of the Act. A copy of the Opinion so holding will be found in the Transcript of Record accompanying the petition of the Forged Steel Wheel Company for *certiorari*, submitted contemporaneously with this petition, at page 275.

The situation, therefore, as it existed when the two cases came before the appellate Court, was that two District Courts had construed the section of the Act in question, as applied to the same state of facts, diametrically opposite one to the other—one court holding that the income derived from the sale of rough shell forgings was not subject to the tax, and the other court holding directly to the contrary. The appellate Court, while affirming the judgment of the Court below in the petitioner's case, reversed the judgment for the Forged Steel Wheel Company in the Western District of Pennsylvania. But one Opinion was filed, applying to both cases. The Opinion covers also the case of Carbon Steel Wheel Company *vs.* Lewellyn, Col-

lector, which had been previously argued in the appellate Court. The facts in that case have no such relation to those in the two other cases as to make the decision as to it determining of the others.

The petitioner submits, together with this petition, a certified copy of the Transcript of Record, including the proceedings in the Circuit Court of Appeals.

#### REASONS RELIED ON.

Among the reasons relied on for the allowance of the writ are the following:

##### I. QUESTIONS OF LAW ARE OF GREAT PUBLIC IMPORTANCE.

The questions of law involved are of great public importance, and of serious concern both to a large number of persons throughout the country the amount of whose tax obligations depends upon the correct construction of the Act, and also to the Government itself, to whom it is important that it may know authoritatively and finally, through one decision broadly operative, how far it may go in levying taxes under the section of the Act in question, and to what extent, if at all, it must provide for refunding taxes already levied and collected, and paid under protest.

##### II. MANY OTHER SIMILAR CLAIMS PENDING.

Besides the petitioner's claim, and the claim of Forged Steel Wheel Company, so submitted contemporaneously, there are pending and awaiting decision, either in the courts or in the office of the Commissioner of Internal Revenue, claims against the Government of a number of parties, aggregating several millions of dollars, asserting the right to refund of taxes on net profits on sales of material entering severally into vari-

ous articles of those named in the statute, on the ground that the material, when sold and delivered, was not, in law, any part of the articles the net profits on which were made taxable, and that the persons taxed were not persons manufacturing any part thereof. The litigation of these claims independently to a final conclusion, if proceeded with, will involve large expense both to the various claimants and to the Government. This expense will be entirely avoided if a final construction of the section of the Act brought up on this petition is given by this Court, as a guide to the lower courts and to the various claimants.

In an Appendix to the Brief herewith submitted (page 44) the petitioner has scheduled a list of some of the pending claims which have come to its knowledge, the final determination of which depends upon the proper construction of the Act.

Moreover, the section of the Act was considered by the lower court merely in its application to shell forgings. It also taxes profits derived from the sale of a number of other articles or "parts" thereof, among which are projectiles, torpedoes, firearms, cannon, machine guns, rifles, bayonets, electric motor boats and submersible vessels.

Thousands of citizens who supplied material entering into the above various articles are no less vitally interested than is the petitioner in the soundness of the lower court's construction of the statute—resting, as it did, on the purpose or intent of the Act as the court conceived it, instead of upon the meaning of the words used to express the actual intent.

### III. ERRORS OF THE COURT AND CONFLICT OF DECISION AS BETWEEN ITS OPINION (THIRD CIRCUIT) IN THIS CASE, AND DECISIONS OF THE CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT, AND OTHER FEDERAL COURTS, AS HEREINAFTER SET FORTH IN DETAIL IN THE BRIEF ACCOMPANYING THIS PETITION.

The important words in the Section of the Act for consideration are, "any part of any of the articles men-

tioned" and "any person manufacturing," as applied to the subject matter.

The meaning of the word "part" or "parts" of a composite structure has been established for years, in numerous decisions, as signifying a *substantially finished part* as related to the whole structure and to the purpose it is intended to subserve.

The meaning of the words "manufactured article" has also been definitely adjudged as implying that the processes of manufacture devoted to it must be so far completed as to render the article ready for use without additional processes of manufacture, and that, short of the carrying of any article to the stage of practical completion, the work upon it is nothing but a *partial manufacture*, and the person performing the work upon it is *not a person manufacturing it*. (See accompanying Brief, pages 22-30.)

The decision of the Court below is directly in the face of the authorities establishing the above propositions. The refusal of the court below to follow the precedents in interpreting the meaning of the words, on the ground that the precedents were established in customs duties cases, and that the protection of domestic industry was the moving reason for the prior decisions on the point, we claim to be without warrant. In our Brief we show that one of the earliest authoritative decisions establishing that in order for a particular commodity to be considered a part of a composite article for which it is designed, it must be a substantially completed part, was *United States vs. Thirty-One Boxes*, 28 Federal Cases, p. 56, (Dist. Ct. S. D. New York) (1833)—that case arising under the Act of 1824, when the "tariff for revenue," as distinguished from the "tariff for protection" doctrine prevailed in our legislation.

We also show that the distinction between a manufacture of a part and a partial manufacture has been definitely established or recognized by this Court in such cases as the Sugar Bounty Cases, and also by the Federal Courts in bankruptcy or insolvency cases, in which cus-

tems tariff theories had no place in determining the meaning of the statutory words involved.

The section of the Act has a very wide and quite sufficient application without it being necessary to extend its scope in the way the lower court did. In the accompanying Brief there is printed (page 40 *infra*) a list of distinct parts of various kinds of the articles specified, which are commonly recognized as parts for assembling or sale purposes, and manufactured and known in the art and trade as such. The Act would therefore, have a very definite and at the same time wide application to well recognized parts of the articles mentioned, without extending the meaning of the word "part" as the court has done, artificially, and against the precedents.

IV. THE LOWER COURT'S RULING WAS DIRECTLY AGAINST THE WELL ESTABLISHED RULE OF CONSTRUCTION OF TAXING STATUTES, THAT A TAX IS NEVER IMPOSED ON A CITIZEN WHEN THE QUESTION OF HIS LIABILITY IS AT ALL DOUBTFUL. GOULD *vs.* GOULD, 245 U. S. 151, 153.

V. THERE ARE PRECEDENTS IN THIS COURT FOR THE ALLOWANCE OF THE WRIT.

The exercise of this Court's jurisdiction in favor of granting the writ, would be in accordance with such precedents as *U'On Baumbach vs. Sargent Land Co.*, 242 U. S. 503, and *Lynch vs. Turrish*, 247 U. S. 221. In those cases this Court reviewed on *certiorari* certain judgments obtained by the Government against defendants under, respectively, the Corporation Tax Law of 1909 and the Income Tax Act of 1913, both of which Acts had been repealed or superseded by other Acts when this Court took jurisdiction—the taking of jurisdiction being clearly for the purpose of having a final construction given to certain aspects of those statutes, when the interests of a large number of persons were involved, and litigations and claims, to an indefinite number and extent, were affected.

Wherefore, the foregoing matters being considered, your petitioner prays that the Court will grant its writ of *certiorari* directed to the United States Circuit Court of Appeals for the Third Circuit, requiring that Court to certify a full and complete transcript of the record in the above entitled cause to this Court for review, and that this Court will thereupon proceed to correct the errors complained of, reverse the judgment for the respondent and remand the cause, and give your petitioner such other and further relief as the nature of the case may require, and to the Court may seem proper in the premises.

And your petitioner will ever pray.

WORTH BROTHERS COMPANY  
By

A. A. COREY, JR.,  
*Vice President.*

A. H. WINTERSTEEN,  
CHADBOURNE, BABBITT & WALLACE,  
*For Petitioner.*

#### CERTIFICATE.

I certify that I am attorney for and of counsel for the petitioner herein; that the allegations contained in said petition are true, and that said petition is, in my opinion, well founded in point of fact as well as law.

A. H. WINTERSTEEN,  
*Attorney for Petitioner.*

## BRIEF IN SUPPORT OF PETITION.

The Court is asked in this Petition to call up for review on *certiorari* the construction by the Circuit Court of Appeals for the Third Circuit of Section 301, Title III, of the Act of Congress of September 8, 1916, which imposed a tax of twelve and one-half per centum on the net profits received from the sale of certain articles manufactured within the United States and selected by Congress for special taxation. The text of the section is transcribed on the second page of the petition.

The subject-matters of the taxation are:

- (a) Gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes;
- (b) Cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes;
- (c) Projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition;
- (d) Firearms of any kind, and appendages, including small arms, cannon, machine-guns, rifles and bayonets;
- (e) Electric motor boats, submarine or submersible vessels or boats; or
- (f) Any part of any of the articles mentioned in (b), (c), (d) or (e).

The specific articles covered by the decision of the lower Court were certain rough shell forgings made by the petitioner during the year 1916 for Midvale, for use by the latter in making finished high-explosive shells which it had contracted with the Government of the Republic of France to make and deliver.

The forgings were rough cylindrical articles, open at one end, fabricated from the ore stage by six processes. They were intended to be used by Midvale, the contractor with the French Republic, for development by it through such further processing into shell bodies. The material had to go through twenty-nine important different forging and machining processes in the hands of Midvale before becoming shell bodies. These processes cost sixty per cent. of the total cost of the completed shell body. The completed shell body is only one of four distinct parts of the shell of the French type, the other parts being the copper band, the fuse and the high-explosive content.

The forgings were of course not shells, the shell being a composite thing and each part being necessary to make up the whole.

The questions were:

- (1) Were the forgings in their state of delivery to Midvale any part of shells within the meaning of the Statute, and
- (2) Was the petitioner a person manufacturing any part of shells within its meaning?

The appellate Court, reversing the contrary ruling of one District Court in the circuit, and affirming that of another in the same circuit, decided both questions in the affirmative and sustained the tax.

We ask review by this Court, in exercise of its discretion to call up:

## I.

### BECAUSE OF THE WIDE PUBLIC IMPORTANCE OF A FINAL CONSTRUCTION OF THE STATUTE BY THIS COURT.

Vitally interested in the interpretation of the Act are not merely those material men who supplied shell forgings to

contractors for development into shells, but also all the material men throughout the country who have sold to others partially developed material subsequently used in making any of the articles, the profits from the sale of which are made taxable by the act. Those articles, it will be noted, include not merely those commonly known as munitions of war, but also others such as electric motor boats, which, for many years, in time of peace as well as war, have had a very wide use for business and pleasure purposes. Many claims for refund of taxes, based upon the construction of the act for which the petitioner is contending, are pending in the Office of the Commissioner of Internal Revenue, or were pending when the judgment now sought to be reviewed was handed down, while others are in suit in court awaiting this Court's action.

In the Appendix is a partial list of pending claims known by the petitioner to exist—the list showing amounts involved, the character of the claims and their status. It is necessarily fragmentary—the government officials, upon application made for a complete list, not having been able to furnish the information desired.

## II.

BECAUSE A FINAL CONSTRUCTION OF THE ACT BY THIS COURT UPON THE ISSUE RAISED BY THE PLEADINGS IN THE CAUSE WILL AVOID LITIGATION AND SAVE GREAT EXPENSE, BOTH TO THE GOVERNMENT, AND TO NUMEROUS CLAIMANTS WHO ARE ALREADY PRESSING CLAIMS FOR REFUND IN VARIOUS JURISDICTIONS, AS WELL AS TO THOSE WHO HAVE YET TO PRESENT THEM WITHIN THE TIME LIMIT FIXED BY THE STATUTE.

(See Appendix to this Brief, page 44.)

## III.

BECAUSE, AS THE PETITIONERS CONCEIVE, THE DECISION OF THE COURT BELOW WAS GRAVE ERROR, WHICH WE BELIEVE CAN BE DEMONSTRATED TO THE SATISFACTION OF THIS COURT UPON FULL ARGUMENT, WITH THE MANUFACTURING EXHIBITS THROWING LIGHT ON THE SUBJECT-MATTER AVAILABLE FOR THE COURT'S INSPECTION.

## THE ERRORS OF THE COURT BELOW.

## I. THE FUNDAMENTAL ERROR.

The fundamental error of the Court was in its conception that the purpose of the statute, as the Court viewed it, controlled its construction, instead of its construction being determined by the meaning of the words used by the law-makers to carry out that purpose.

The Court held that the purpose was to tax the profits derived from all such specified articles or parts thereof as were either made for war purposes or were withdrawn from the general field of commerce and used for the making of war articles. Conceiving that to be the end sought, the meaning of the essential words of the statute used to accomplish it was made to conform to the purpose found, the settled meaning of those words being ignored or construed away—with the result that the petitioner's case was dismissed as without merit.

*Our position, on the contrary, was and is that the essential inquiry was not what Congress intended, but what is the meaning of the words it used to express that intent, and that that meaning, when ascertained, not only determines the meaning of the statute but the Congressional intent in enacting it.* That is the settled law laid down by this Court.

*In United States vs. Goldenberg*, 168 U. S. 95, 102, the Court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function to legislate, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies \* \* \* justify any judicial addition to the language of the statute."

And in *Bart Refrigerating Co. vs. Sulzberger*, 157 U. S. 1, 37:

"As declared in *Hadden vs. Collector*, 5 Wall 107, 111, 'what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes.' *Where the language of the act is explicit, this Court has said 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the Legislature.* \* \* \* It is not for the Court to say, when the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.' *Scott vs. Reed*, 10 Pet. 524, 527."

2. THE ERROR IN THE COURT'S RULING THAT THE FORGINGS INVOLVED IN THE CASE WERE PART OR PARTS OF SHELLS.

Under the rules and the practice of this Court, as we understand them, on such a petition as the present, discussion at any length of the reasoned meaning of the word "part" in a composite structure is not called for. It is sufficient to say that by numerous adjudicated cases in the courts, including the Customs Court (which is the court of last resort in customs cases), and by the Boards of General Appraisers—the cases extending over three-quarters of a century—it has been settled that when parts of a composite article are declared taxable, the material constituting the parts must be finished or practically finished, and be in condition to be assembled with or united to another part or parts to make up the practicable thing of which they are a necessary component. Short of development up to that stage a fabrication intended for ultimate use in a composite structure is nothing but material entering into a "part."

The same practical principle of interpretation of objective words in taxing statutes has also determined the ruling that when a particular article, whether of a composite character or a single unit, is made taxable, it must, when it comes before the taxing authority, be developed up to a condition to make it the thing that is taxed, that is to say, it must be finished—unless in the statute itself the article is made taxable in an unfinished condition.

THE CASES:—

The following are a few of the cases establishing the above propositions:

*United States vs. Thirty-One Boxes*, 28 Federal Cases, page 56, Dist. Ct. S. D. New York (1833):

Question of unfinished links as "parts of chains" under Tariff Act of 1824.

*Held.* "Nothing can be deemed part of the chain that is not as to itself as finished and complete as the entire chain"—even though the articles in question would be fit for nothing but scrap iron unless made into chains.

*In re Blumenthal*, 51 Fed. Rep. (Aff'd 1 U. S. App. 680) C. C. U. S., S. D. New York (1892):

*Held* that disks of mother of pearl intended for buttons and complete excepting that they were not pierced with holes or shanked through their centre, were not buttons under the Tariff Act of October 1, 1890, the Court saying:

"Although they may stop short of being complete buttons by a very small measure, that circumstance is immaterial; and it is also wholly immaterial with what intent the process of their manufacture was stopped at that point. \* \* \* These articles here are not completed buttons, because they lack the essential element of a device whereby they may be affixed to garments."

*In re Protest of Reiss Bros. & Co.*, T. D. 16977—G. A. 3405, Synopsis of Treasury Decisions, 1896, page 273:

The question was whether unfinished or incomplete pipe bowls composed of meerschaum, were pipe bowls or smokers' articles under the Tariff Act of 1894, when they were not bored out so as to subserve the purpose of pipe bowls in holding tobacco and also had no orifice made for the insertion of the pipe stem, and could not be used as pipe bowls or smokers' articles in their incomplete condition as imported.

*Held:* The articles are shaped like pipe bowls and have been so far advanced in manufacture as probably to be unfit for any other purpose than pipe bowls.

\* \* \* \* \*

"We find that the articles in question have not been sufficiently advanced in manufacture to answer the purpose of pipe bowls or smokers' articles, and that they are not such in fact."

*United States vs. Simon*, 84 Fed. Rep. 154, C. C. U. S. S. D. New York (1897):

The question was whether India rubber tubing in meter lengths, colored, chiefly used in making stems of artificial flowers, were dutiable as manufactures of India rubber or as parts of artificial flowers.

*Held* that they were dutiable as manufactures of India rubber, inasmuch as they were not any finished part of an artificial flower—Wheeler, District Judge, saying:

"The paragraph under which this manufacture was assessed *does not provide a duty on materials for artificial flowers but for parts of artificial flowers.* \* \* \* *This tubing is not any finished part of an artificial flower*, but is merely a material from which the stems, as such a part of an artificial flower, can be made. As this tubing is not a part of an artificial flower, the protest should be sustained." Decision of the Board of General Appraisers reversed.

*United States vs. Reisinger*, 94 Fed. Rep. 1002, Circuit Ct. of App., Second Circuit (1899):

The question was whether carbon sticks, 36 inches long, intended for ultimate use in electric lighting, but which required to be cut into suitable lengths, and the ends pointed or ground before they could be used, were dutiable as articles or wares composed wholly of carbon, not specially provided for, or as carbons for electric lighting.

*Held*, that, *although intended ultimately for electric lighting, the fact that it was necessary to bestow further labor on the carbon sticks in order to fit them for such use, precluded their inclusion in paragraph 98 of the Tariff Act of 1897, which imposes a certain duty upon carbons or sticks for electric lighting.* The decision of the Circuit Court to the contrary was reversed, and that of the Board of General Appraisers affirmed, which held the articles dutiable as articles or wares composed wholly of carbon, not specially provided for.

Treas. Dec. 21719. G. A. 4590, Treas. Dec. Vol. 2 page 615 (1899):

The question was as to the status of certain pieces of polished hard rubber, about four inches long, which, when divided in the centre, were to be made into mouth pieces for pipes, as dutiable as smokers' articles, or as manufactures of hard rubber under paragraph 450 of the Act of July, 1897. The lengths were shaped and polished, but, after being cut, *the pieces must be further bored and screws put in to render them suitable for smokers' use.*

*Held* that none of the goods were smokers' articles, and that they were dutiable as manufactures of hard rubber.

Treas. Dec. 32396 (Abstract No. 28094) 1912—Decision of Board of General Appraisers:

The question was as to the status of unfinished pipe mouth pieces which still had to be joined, fitted to a wooden part, threaded and polished before they were ready to be put into pipes.

*Held* by the Board that they were no more smokers' articles than would be crude rubber from which they were manufactured, and that *they were simply articles from which a smokers' article could be, and eventually would be made.*

*Hunter vs. United States*, 134 Fed. Rep. 361, C. C. A. Second Circuit (1904):

The question was whether pieces of paper, cut by machinery into certain appropriate shapes and sizes adapting them to be folded so as to constitute envelopes of desired shapes and sizes, were paper envelopes under paragraph 399 of the U. S. Comp. Stat. of 1901, or were manufactures of paper under paragraph 407 of the Act of July 24, 1897 (c. 11).

*Held* that they were not paper envelopes, but were manufactures of paper, Lacombe, Circuit Judge, saying:

"In common everyday speech the word 'envelope' is used as implying the actual case or wrapper, of paper or cloth, in which a letter or the like may be enclosed. The 'blanks' here imported have not yet become such case or wrapper, *even though they may be of such shape and size as to unfit them for other purposes.* It is still necessary to fold over the flaps, and to apply gum to the edges of some of them, and actually to stick together the side and bottom flaps. These are substantial steps in the process of manufacture."

*In re Protest of United States Express Co.*, T. D. 35697, G. A. 7771, Treas. Dec. Vol. 29, page 203—U. S. General Appraisers, New York (1915):

The question was whether *a piece of wood roughly carved into the shape and form of a pipe bowl, but incapable of such use in its then condition*, was a pipe bowl under paragraph 381 of the Tariff Act of 1913, or was a manufacture of wood under paragraph 176 of the Act.

*Held*, under the authority of Reiss Bros. & Co., G. A. 3405, (T. D. 16977), that the article was not a pipe bowl but a manufacture of wood.

*American Express Company's case*, Abstract 33385, T. D. 33695 (1913) before the Board of General Appraisers:

*Meerschaum blocks which have to be shaped before using as smokers' articles, were held to be dutiable as meerschaum, crude or manufactured, and not as smokers' articles.*

*Protest of Benedict Weiss*, Abstract No. 38991, Treas. Dec. Vol. 29, p. 796 (1915):

The question was as to the status of pieces of wood roughly carved into the shape of pipe bowls, claimed dutiable as manufactures of wood.

*Held that the wood in question, which was found not to have been sufficiently advanced in manufacture to answer the purpose of a pipe bowl, was not a pipe bowl under the Tariff Act, but was dutiable as manufactures of wood under paragraph 176 of the Act.*

*Parts of Musical Instruments.*, T. D. 27207, G. A. 6312 (1906) before U. S. General Appraisers Lunt, Sharretts and McClelland:

The question was as to the status of articles consisting each of three sections of granadilla wood, rough turned and bored, two of which sections were tubular in form,  $1\frac{3}{8}$  inches in diameter by 3 feet 11 inches in length, respectively. The third section was bell-shaped—the three pieces being designed for use in the manufacture of clarinets. Duty was assessed upon the merchandise at a certain rate under the provisions of paragraph 453 of the Tariff Act of 1897, as parts of musical instruments. The importers claimed that the articles were dutiable at 35 per cent. ad valorem under paragraph 208 of the Act, as manufactures of wood.

*Held* as follows:

"The disputed articles are in the nature of materials intended to be made into musical instruments, but in their rough condition as imported they certainly are not parts of such instruments. *It is doubtful if any but completed parts which require only assembling to make them musical instruments, or are intended to supply a missing part thereof, would be included in this paragraph.* (Paragraph 453 of the Tariff Act of 1907.)"

*Fenton vs. United States*, (1911) 1 U. S. Cust. Appl. 529:

*Held* the term fishing tackle does not include a rod, reel, hook or float that is not in finished condition, ready for the angler's use, and the term "parts thereof" must refer to the

completed article, whatever it be, that is also ready for use, either alone or in connection with other articles of the angler's outfit.

*Redden & Martin vs. United States (1915), 5 U. S. Cust. Appls. 485, 489.*

*Held* only when a tariff act specially makes subject to duty articles whether *unfinished* or *finished* or *partly manufactured*, as well as manufactured articles, will commodities be subject to duty in their *unfinished* or *partly manufactured* state.

### 3. THE ERROR IN THE RULING OF THE COURT THAT THE PETITIONER WAS A PERSON MANUFACTURING A PART OF A SHELL, ALTHOUGH THE PROCESSES CONDUCTED ON THE MATERIAL LEFT IT WHOLLY UNFIT FOR THE PURPOSES IT WAS ULTIMATELY INTENDED TO SUBSERVE.

The distinction here is between a *manufactured* and a *partly manufactured* article.

That the material here involved was merely a *partly manufactured article*, and not a *part manufactured*, and that therefore the petitioner was not a person manufacturing a part of a shell, the following cases, as we claim, conclusively show. They establish that the fundamental idea of a manufactured article is that it must be so nearly completed as to be serviceable for the purpose for which it was designed.

#### THE CASES:—

In *United States vs. Potts*, 9 U. S. 284 (1809), the question was whether round copper plates, turned up at the edge and intended to be made into cooking utensils, were manufactured articles or raw copper.

Chief Justice Marshall says (page 287):

"From the facts stated, the copper in question cannot be deemed manufactured copper, within the intention of the legislature."

In *Lawrence vs. Allen*, 48 U. S. 785 (1849), the question was whether certain rubber imported was manufactured or unmanufactured India rubber. It appeared that it was customary to dip crude clay models, representing a bottle or shoe, or something of that kind, in the sap of the tree and by evaporation let it harden and then, by breaking out the clay, one would have a crudely shaped shoe or bottle, or something of that kind, and that it was the habit of importers in the United States to import rubber in this shape, which they used in subsequent manufacture of articles, including India rubber shoes, which were made to suit the American and European markets in entirely different ways, and which involved the remelting of the rubber shoe, which was imported, and using it simply as a raw material. It appeared, however, from the evidence, that the India rubber shoes imported were in a condition that they could be worn without further labor upon them and were made for the purpose of being worn and were often actually worn in this form. It was held that they were dutiable as India rubber shoes because they were a completely manufactured article, and the fact that it might suit some manufacturers' convenience to use them as a raw material was not controlling.

Justice Woodbury says (page 794) speaking of the more modern idea attached to the word manufacture.

\* \* \* "it is making an article, either by hand or machinery, into a new form, capable of being used, and designed to be used, in ordinary life."

He says again (page 794):—

\* \* \* "it is manifest that the India rubber is not meant to be taxed as a manufacture, though so hardened and changed, unless, at the same time, it is put into a shape which is suitable for use, and adapted with a design to be used in a way that is calculated to rival some domestic manufacture here, rather than merely to furnish a raw material in a more portable, useful and convenient form for other manufacturers

here. In the latter case, within the policy and purpose of the tariff law yielding protection, it is 'unmanufactured,' or, in other words, not made abroad for use in its existing form except as a raw material, like pig iron or pig lead. But in the former case, within that policy and purpose, it is 'manufactured' as it is made in a shape for use as a manufacture *without being afterwards materially changed in form*, and is designed to be so used, and hence comes in as a competitor with our own manufacture."

*Hartranft vs. Wiegmann*, 121 U. S. 609 (1886), is considered the leading case upon this subject. The question was whether the sea shells, there imported (upon which certain ornamental designs had been etched or carved), were still sea shells and came in free, or whether they were manufactured shells and subject to duty.

Justice Blatchford says (page 615):—

"They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell."

*Dejongo vs. Magone*, 159 U. S. 562 (1895), was a case involving the manufacture of paper.

Justice White says (page 568):—

"There was no such change of form as in the case of paper screens, paper boxes, paper envelopes, and other like manufacture of paper."

In *Anheuser-Busch Brewing Association vs. United States*, 207 U. S. 556 (1907), Justice McKenna says (page 562):—

"There must be transformation; a new and different article must emerge, 'Having a distinctive name, character and use.'"

*United States vs. Semmer*, 41 Fed. 324 (1890), Circuit Court, S. D. New York, was a case which involved the

question of whether the glass imported was completely manufactured.

Judge Lacombe says (page 326):—

"\* \* \* the mere fact of the application of labor to an article, either by hand or by mechanism, does not make the articles necessarily a manufactured article, within the meaning of that term as used in the tariff laws, unless the application of such labor is carried to such an extent that the article suffers a species of transformation, *and is changed into a new and different article, having a distinctive name, character or use.* \* \* \*

"*The labor bestowed upon the article is to be continued to such an extent as to transform it into a new and different article commercially, having a distinctive name in commerce, having a distinctive character commercially, or having a distinctive commercial use.*"

*Erhardt vs. Hahn*, 55 Fed. 273 (1893), C. C. A. Second Circuit, was a case which involved duties upon agate and other semi-precious stones, cut, ground and polished into the shape and for the uses, respectively, as penholder handles, knife handles, button-hook handles, etc. The Court held that they were not manufactured articles.

The Court says (page 275):—

"It has been repeatedly decided, under the tariff acts, that where an article has been advanced through one or more processes into a *completed* commercial article, known and recognized in trade by a specific and distinctive name, other than the name of the material, and is put into a *completed* shape designated and adapted for a particular use, it is deemed to be a manufacturer."

In *Smith vs. Rheinstrom*, 65 Fed. 984 (1895), C. C. A., Sixth Circuit, Judge Taft uses this language (page 986):

"What we have to decide is whether its qualities are such as justify to prevent its being taxed as the thing from which it is made. This must depend, of course, upon the amount of change to which the original article has been subjected to make the new article. It is a question of degree."

In *Robertson vs. Gerdan*, 132 U. S. 454 (1889), the question involved was whether pieces of ivory, for the keys of pianos and organs, are musical instruments.

Justice Blatchford says (page 459):—

*"It is very clear to us that the fact that the articles in question were to be used exclusively for a musical instrument, and were made on purpose for such an instrument, does not make them dutiable as musical instruments."*

In *Worthington vs. Robbins*, 139 U. S. 337 (1890), the question was what duty should be imposed upon white hard enamel imported for the purpose of making watch dials.

Justice Blatchford uses this language (page 338):—

"\* \* \* in the form or condition as imported, it cannot be used for any of the purposes above described, nor for any purposes whatever of practical use to which it is adapted or ever applied and that, before it can be applied to any practical use, its present form and condition must be changed by grinding or pulverizing, and new processes of manufacture applied."

*Saltonstall vs. Wiebsch*, 156 U. S. 601 (1894), was a case which involved the question of whether carpenters' pinchers, scythes, and grass-hooks, made of forged steel, were taxable as forgings of iron and steel, or manufactures composed of iron and steel. The Court held that they were not taxable as forgings, although they were made by forging, because there were two additional processes after the forging, to wit (1) tempering and (2) grinding.

Justice Brown says (page 603):—

"But we do not understand the term 'forgings' to be applicable to articles which receive treatment of a different kind than hammering before they are complete; such, for example, as grinding, tempering, or polishing."

*Tidewater Oil Co. vs. United States*, 171 U. S. 210 (1897), is quite a leading case and is known as the "Box Shook Case."

The Court observes (page 217):—

"\* \* \* the finished product of one manufacture thus becoming the material of the next in rank."  
\* \* \*

"It is not always easy to determine the difference between a *complete* and a *partial* manufacture, but we may say generally that an article which can only be used for a particular purpose, in which the process of manufacture stops short of the completed article can only be said to be *partially manufactured* within the meaning of this section."

Again (page 218):—

"It may be said generally, although not universally, that a complete manufacture is either the ultimate product of prior successive manufactures, such as a watch spring, or a penknife, or an intermediate product which may be used for different purposes, such for instance as pig iron, iron bars, lumber or cloth; while a *partial manufacture* is a mere stage in the development of the material toward an ultimate and predestined product, such for instance as the different parts of a watch which need only be put together to make the finished article."

*Allen vs. Smith*, 173 U. S. 380, and *Burdon Central Sugar Refining Co. vs. Payne*, 167 U. S. 127 (1896),

known as the Sugar Bounty Cases, are illustrative of the same proposition, where it was held that the man who completed the manufacture of sugar was the one who was entitled to the bounty.

In *Allen vs. Smith*, Justice Brown says (page 399) :—

"In a number of cases arising in this Court under the revenue laws, it is stated that the word 'manufacture' is ordinarily used to denote an article upon the material of which labor has been expended to make the *finished product.* \* \* \*"

(Page 400) :—

"So the one who raises the cane is undoubtedly entitled to be considered the producer of the cane, but he is not the producer of the sugar. *That appellation is reserved for him who turns out the finished product.*"

Again (page 401) :—

"To return to the illustration of manufacture. Can it be possible that, if a bounty were offered for the manufacture of furniture, the manufacturer of the finished product would be obliged to share such bounty with the owner of the trees, or the manufacturer of the lumber cut from such trees, from which the furniture was made? Or, under similar circumstances, would the manufacturer of watches be compelled to share the bounty with the score of prior manufacturers who contributed directly or indirectly to the production of the various articles of mechanism which go to make up the finished watch? To state this question is to answer it."

In *Schoverling vs. United States*, 142 Fed. 302 (1906), C. C., Southern District, New York, before Judge Hazel,

it was held that certain India-rubber pads for guns were not dutiable as shotguns or *parts of shotguns*.

*Norris vs. Pennsylvania*, 27 Pa. 494 (1896), involved the question of whether iron in form and size fitted and designed for locomotive engine tires, with flanges, so as to require only to be cut the proper length, turned, welded and adjusted, to the cast iron wheels, were parts of a locomotive.

Justice Black uses this language (page 496):—

"To make in the mechanical sense does not signify to create out of nothing; for that surpasses all human power. It does not often mean the production of a new article out of materials entirely raw. It generally consists in giving new shapes, new qualities, or new combinations to matter which has already gone through some other artificial process."

*In re First National Bank of Belle Fourche*, 152 Fed. 64 (1907), C. C. A. Eighth Circuit,

Judge Brown uses this language (page 67):—

"\* \* \* it produces a new and useful article, a bridge, when by the application of skill and labor to the materials of which it is comprised it constructs it."

*In Central Trust Co. vs. Lueders*, 221 Fed. 829 (1915), which was affirmed by the Circuit Court of Appeals, Sixth Circuit, Judge Knappen says (page 838), quoting Mr. Justice Brown, that the word "manufacture,"

"is now ordinarily used to denote an article upon the material of which labor has been expended, to make the *finished product*."

And again, quoting Mr. Justice Field:—

"Manufacture is transformation, the finishing of raw material into a change of form or use."

In *Vandergrift vs. United States*, 164 Fed. 65 (1908), Circuit Court, E. D. Pa. (a tariff case) Judge McPherson says (page 69), quoting with approval the General Appraiser in *In re Eckstein*, G. A. 5822:

"These decisions amply support the proposition that, in order to constitute a manufactured article, the processes of manufacture devoted to it must be so far completed as to render the article ready for common use, known and designated by a common name, *without additional processes of manufacture.*"

In *United States vs. Thomas Prosser & Son*, 177 Fed. 569 (1910), Circuit Court S. D., New York, Judge Martin uses this language (page 571):

"As I construe these two paragraphs, it is a question of fact as to whether these articles, after having been forged, were so far developed by a finishing process that they have been advanced from the condition of a forging to that of a manufactured metal."

In *Bromley vs. United States*, 156 Fed. 958 (1907), Circuit Court of Appeals, Third Circuit, Judge Brushington concludes (page 959):

"In view of the careful work thus expended on them to fit them as parts of valuable machines, we are clear their character as mere castings had merged into the higher mechanical plane of a manufactured article."

#### 4. THE DISTINCTIONS MADE BY THE COURT BELOW.

It was unequivocally admitted by both of the courts below (Transcript, pages 154, 184-185), that the customs tariff cases define the words we have been considering according to our contention.

Two distinctions were however set up to avoid their application to the case in hand:

*First*, that the meaning of the words in the customs tariff cases ought not to be extended to the same words in internal revenue cases because of supposed differences in the two classes of revenue laws. And

*Secondly*, that the tax in question was laid upon the business of manufacturing as distinguished from one laid upon articles as such, and that, therefore, all engaged or connected with the manufacture of munitions of war, and deriving a profit therefrom as manufacturers, were hit by the statute.

These distinctions will briefly be considered in their order.

*As to the First Distinction:*

It was said that the settled definitions of the words in the customs tariff cases cited are of no significance in this internal revenue case because the purpose of the customs tariff legislation was to encourage and protect domestic industry, and that those definitions must therefore be understood as limited in their application to cases arising under such legislation, and cannot be extended beyond them to cases where the "tariff for protection" theory does not apply.

We point out, in answer to the above:

(a) That the cases fixing the meaning of the word "part" in a composite article run back well into the era of the prevalence of the "tariff for revenue" doctrine, and that in no case has it been asserted, or made a *ratio decidendi* that the meaning of the word is to be determined with a view to having it fit in with any "tariff for protection" view.

See the early case of *United States vs. Thirty-one Boxes*, 28 Fed. Cases 56 (1833), arising under the Tariff Act of 1824, above cited (p. 15).

The ground of the decision was that the natural meaning of the word "link" as related to a chain, of which the ma-

terial when finished was destined to become a part, excluded the material in an unfinished condition from being adjudged a "part" of the chain—for the reason that a part "denotes a portion taken from the whole and still retaining the properties of the whole, less only the extent."

In none of the later cases where the word "part" has come up for interpretation, so far as we have been able to find, has anything but resort to the natural meaning of the word been found necessary to interpret it—excepting only when Congress in terms or by implication, in enacting any particular statute, divorced the word from its natural meaning. This is in accord with the settled doctrine that the natural, obvious meaning must be given to the language of a statute where there is no ambiguity in it. *Bate Refrigerating Co. vs. Sulzberger*, 157 U. S. 1, 36.

(b) We further point out that the appellate Court was wholly in error in its assumption that the meaning of the word we are considering was fixed for it exclusively in the customs tariff cases, and that that meaning must be confined to such cases. See *Burdon Central Sugar Refining Co. vs. Payne*, 167 U. S. 127, and *Allen vs. Smith*, 173 U. S. 389.

In the latter case a contest arose as to which of two parties was entitled to the sugar bounty given to the producer of sugar—the grower of the cane or the man who produced or manufactured the finished sugar. Obviously, with that the contest, and neither the United States nor one of its Collectors a party, the occasion presented itself for definition of the words "manufacture" and "manufacturer" free from any theory of interpretation based upon customs tariff policies. Both the contestants were claiming the bounty, and it belonged to one or the other, and discussion of the theory of the Bounty Act, much less of the Customs Tariff laws, was unnecessary in arriving at the meaning of the words defined.

This Court, however, resorted to the customs tariff cases for a definition of the words, and ruled the case upon their authority. We have quoted certain language used by

Mr. Justice Brown in the above case at page 28, *supra*, and refer to it at this point.

The case of *Tidewater Oil Co. vs. United States*, 171 U. S. 210, involving a claim of right to a drawback under the provisions of R. S. 3010 (Comp. Stats., p. 6829), cannot properly be treated, as the appellate Court in its opinion treated it, as if it decided that only where encouragement to domestic manufacture is involved in the purpose of a statute must the word "manufacture" be confined to the finished article. The language of the Court quoted at page 27, *supra*, in this brief, clearly shows that the Court intended to recognize and did recognize and adopt as of general application the distinction between a *partial manufacture* and a *manufacture or complete manufacture*.

In cases which have arisen under the bankruptcy or insolvency laws, the definitions in the customs tariff cases have also been followed and applied, thereby further showing the general application of the definitions fixed by those cases.

See in re *Rheinstrom & Sons Co.*, 207 Fed. 119, 130, 135, 136 (1913). *Central Trust Co. vs. Lueders*, 221 Fed. 829, 838 (1915).

#### *As to the Second Distinction:*

While it is true that the tax is upon profits derived from the business of manufacturing and is specifically laid upon every person manufacturing, it *nowhere appears in the statute that all persons doing work as manufacturers upon material intended for and subsequently entering into munitions of war, and deriving a profit therefrom, are subject to the tax.* The Act, after naming a number of articles constituting its subject-matter, plainly declares that the tax shall be paid from the net profits received or accrued "from the sale or disposition of such articles," and shall be paid by every person manufacturing any of such articles or any part of any of the articles.

There is clearly here as definite as possible a limitation of the reach and scope of the Statute to those persons who manufacture the *articles specified or any part of any* of them.

The statute was never meant to tax one who performed but part of the work essential to producing a single one of four distinct parts of the completed shell.

It follows therefore that no person whose product is not one of the manufactured articles specified, or a manufactured part of any of them,—as the word "manufacture," (as meaning a completed fabrication), and as the word "part," (as meaning a completed part), had been defined for the lawmakers in countless decisions—can possibly be within the statute's reach.

The trial Judge (whose language was adopted by the appellate Court), as we believe erroneously, said: "The clear purpose of the Act is, through taxation of the business or occupation of manufacturing munitions of war to reach the profits of all those engaged in such manufacture, whether engaged in manufacturing to completion or *engaged in any part of such manufacturing.*"

If that were the purpose of the act it would follow that it was intended to reach every manufacturer whose material goes into munitions. But, as pointed out by Judge Thomson, of the Western District of Pennsylvania, in his Opinion in the *Forged Steel Wheel Co.* case (see Transcript of record in that case, page 286) Congress definitely rejected a second section of the Act originally introduced proposing to tax the material entering into and used as a component part of the articles selected for taxation.

We have already shown, however, that it is not the purpose or intent of the act which controls. Whatever may be conceived to have been the Congressional intent, it is the language of the act actually used by the lawmakers to carry out whatever purposes they had that must govern.

The meaning of the essential words in it which we have been considering having been settled, and Congress, in enact-

ing them, having also with them enacted their meaning, the contrary meaning which the Court below has found in them, it is submitted, must necessarily be excluded.

**5. ROUGH SHELL FORGINGS ARE NOT "PARTS" OF SHELLS ACCORDING TO THE TREASURY DEPARTMENT'S OWN DEFINITION OF THE WORD "PART," IN CONSTRUING THE REVENUE ACT, AND CERTAIN OF ITS RULINGS THEREUNDER.**

In Article XIII of Treasury Decision 2384 (See Stipulation of Agreed upon Facts, Record, pages 33-34), the Commissioner of Internal Revenue, defining the word "part," says:—

"'Any part thereof' as used in Section 301 of this Title is any article *relatively complete* (italics those of the Commissioner himself) within itself, and designed or manufactured for the special purpose of being used as a component part of a completed munition, and which, by reason of some peculiar characteristic, loses its identity as a commercial commodity, and which, without further treatment, cannot be used for any purpose other than that for which it was designed."

The Commissioner, in the italicized portion of the above language (his own italics), has himself fixed the point in the stage of its manufacturing development at which material designed to go into a munition, becomes part of the munition itself. It must be *relatively complete*. By "*relatively complete*" is, of course, meant complete as related to the other parts with which it is to be associated by assembling or attachment, and also as related to the munition as a whole. In other words, to be "*relatively complete*," the article must be so developed at the stage when its status comes up for consideration, that in its then form as well as substance, quantitatively and qualitatively speaking, it can be physically related to and combined with other articles to form the composite thing known as a munition. The words "*relatively complete*" do not mean *partially complete*. The

words "relatively" and "partially" convey different ideas. Nor do the words mean *approximately* complete or *substantially* complete. It is the idea of relativity to other parts that the word conveys. The Commissioner's entire phrase is "relatively complete within itself." The words "complete within itself," as descriptive of an article, mean nothing whatever as bearing upon the present inquiry. Every article, however crude and undeveloped is complete within itself as an *article*. It is only when the significance of the word "relatively" is taken into account in association with, the word "complete" that the whole phrase carries a concrete or, indeed, any definite meaning. Then it becomes a real, living phrase, with the idea central in it that the thing under definition must have a completion, related, in respect of its degree of finish, to the things to which it is to have a relation by juxtaposition or combination of parts, so that all the parts can, and at that time, be associated together, to carry out the ultimate, practical purposes of the manufacture. This means, of course, in the case of a shell, that, for a rough forging intended to be developed into a body for a shell to be regarded as a "part" of a shell, it must, when it comes up for consideration as a shell body, be developed to the extent that the copper band can be put upon it, that the fuse can be screwed into its nose, and that, when these parts are associated with it in its then stage of development, the loading charge can be placed inside of it, and it can then be fired as a shell. To contend that that could be done with the rough forgings involved in this case, in the condition in which they were when delivered by the petitioner to Midvale, is to contend for a palpable absurdity.

The idea of relative completeness as a necessary feature of the article, runs through the whole of Article XIII of the Treasury Decision we are considering. The Commissioner excludes from "parts" of munitions, stock or commercial commodities purchased in the general trade or open market, unless "they are manufactured specially for, and sold to a manufacturer to be, by him, incorporated in and

made an essential part of any munitions." But even as to stock or commercial commodities so specially manufactured and sold, the article must be *relatively complete*, that is, complete as related to the thing of which it is to constitute a part. The fact that the article is designed and specially manufactured to go into a munition, does not make the article a "part." Iron ore may be dug from the ground, developed into pig iron in the blast furnace, manufactured into ingots in the open hearth furnace, sliced into billets, pierced, and drawn into particular shapes, with the definite purpose in view, through all the processes, to have the material made ultimately available for incorporation into and made an essential part of any munitions. It could not, however, be contended that the material back to the ore stage is a "part" of the munition into which it subsequently goes. Such a contention would be equivalent to the claim that Congress, in establishing the Munitions Manufacturers Tax and imposing a tax upon the profits derived from the manufacturer of "parts" of munitions, intended to use the word "part" as equivalent to "ingredient." While it is true, in a sense, that every unit of matter entering into a shell, is a part of the shell in the sense that it is one of the ingredients of the shell, it is not in that sense that the word "part" was used in the tax statute. If that were the case, it would follow, as above pointed out, that all the materials composing the shell, back as far as the ore when dug from the ground, must be considered as "part" of the shell.

It is quite clear why the Commissioner, in his decision, treats a stock or commercial commodity as part of a shell, if manufactured specially for and sold to a manufacturer who subsequently incorporates it as an essential part of a shell. Such stock commodity is, of course, a part of a shell *if, as and when sold to the munition manufacturer, it can, without material change in it, be used as a part*, and the manufacturer of the stock commodity ought not to be relieved from the munitions tax upon it as it goes into the shell merely because it could also be used for some general

commercial purpose other than for use in the manufacture of a shell. The article, however, as above shown, must be a *relatively complete* article, practically ready to be combined with other articles as and when sold, to make up the shell, or it can not be treated as a "part" of a shell. Otherwise the munitions tax would not be what it purports to be, namely, a tax on munitions and parts thereof, but a tax on the materials entering into munitions.

Certain later rulings of the Commissioner of Internal Revenue are most pertinent in this connection.

Section 600 (f) of the Act of October 3rd, 1917, 40 Stat. 316; U. S. Compiled Stat. 1918, Compact Edition Sec. 6309 3/4a, imposes an excise tax of three per cent, "upon all \* \* \* golf clubs \* \* \* games and parts of games." The Commissioner in Treasury Decision 2547, of October 26th, 1917 (see Corporation Trust Company's War Tax Service 1917, pp. 1207-1208) rules upon the following question:

*Question:* "In the case of parts of golf clubs sold to golf professionals in the rough, that is iron heads, wooden heads, leather straps for handles and shafts and these separate parts are assembled by the professional and the completed club sold by him, who is the manufacturer of the golf club and when is this tax payable?"

*Answer.* "'Iron heads, wooden heads' etc. are not golf clubs, neither are they parts of games within the meaning of the statute. *The one who produces the finished product is the manufacturer and is charged with the tax.*'"

Section 600 (g) of the Act imposes a tax of two per cent, upon manufacturers of certain compounds intended to be used and applied for toilet purposes. Deputy Commissioner G. E. Fletcher, in a letter to Alexander, Cohn & Sondheim, dated November 14th, 1917, (see War Tax Service, 1917, p. 1215) ruled as follows:

"You are advised that where goods manufactured by a person require further manufacture before being used by the consumer, *the one completing the manufacture is liable for the tax.*"

**6. THE ACT, WHEN ITS ESSENTIAL WORDS ARE GIVEN THE INTERPRETATION FOR WHICH WE ARE CONTENDING, HAS A NATURAL APPLICATION TO A GREAT NUMBER OF COMMODITIES, AND NO NECESSITY EXISTS FOR EXTENDING THE MEANING OF THE WORDS, BY ANY DOUBTFUL CONSTRUCTION, WITH A VIEW TO FINDING SUBJECTS FOR ITS OPERATION.**

The act was considered mainly by the court as if it meant to tax profits derived only from shells or projectiles and their parts; whereas it included also profits from cartridges, torpedoes, small arms, cannon, machine guns, bayonets, motor boats, and submarines, and their parts. It is a matter of common knowledge that all the above articles have definite parts—some of them many parts—which are completed in finished form and supplied in the trade to manufacturers of the composite articles, and are also manufactured by munition makers themselves as independent parts and supplied to dealers and other manufacturers.

If the reasoning and conclusion of the Circuit Court of Appeals in this case are sound, then it is just as logical to conclude that a person or firm manufacturing the leather or the felt from which a motor boat cushion is made is a manufacturer of a part of a motor boat, and consequently subject to the tax.

The following list is significant:

*List of Distinct Parts of Various Kinds of Articles Mentioned in Section 301 of Title III of the Act of September 8th, 1916, Which Are Commonly Recognized as "Parts" for Assembling or Sale Purposes, and Manufactured and Known in the Art and Trade as Such.*

The various articles mentioned in the above Section are well known respectively to have the following separately purchasable parts:

**CARTRIDGES:**

- Cartridge case;
- Primer;
- Powder;
- Wad, if any;
- Projectile.

**TORPEDOES (Automobile variety):**

- War head;
- Practice head;
- Explosive charge;
- Air flask;
- Air flask head;
- Alcohol lamp;
- Propelling engine;
- Obry gyroscopic gear;
- Many screws.

**SMALL ARMS—**

**SHOT GUN:**

- Barrel;
- Sight;
- Hammer;
- Firing pin;
- Firing pin spring;
- Fore end;
- Trigger;
- Trigger spring;
- Stock;
- Heel plate;
- Lever;
- Lever spring;
- Main spring;
- Bolts;
- Many screws.

**RIFLE (Repeating) :**

Barrel;  
Sight;  
Magazine;  
Magazine spring;

**BAYONETS:**

Parts probably never sold singly to the consumer,  
but consisting usually of a blade; two wooden  
handle parts; burs and rivets.

**ELECTRIC MOTOR BOAT:**

Hull;  
Motor;  
Shafting;  
Bearings;  
Propeller;  
Propeller nut;  
Rudder;  
Storage batteries;  
Steering wheel;  
Tiller ropes;  
Tiller;  
Tiller rope pulleys;  
Reostat;  
Controller;  
Electric wiring;  
Anchor;  
Hawser;  
Side lights;  
Riding lights;  
Water tanks;  
Construction and trimming hardware;  
Fittings, such as  
Cushions;  
Lavatory fixtures;  
Galley stove;  
Refrigerator;  
Cooking equipment;  
Bunks and their equipment;

Signals;  
Compass;  
Repair tools.

**SUBMARINE BOAT:**

All parts listed for electric motor boats, and in addition  
 Magazine follower;  
 Bolt;  
 Firing pin;  
 Firing pin spring;  
 Extractor;  
 Carrier;  
 Carrier spring;  
 Finger lever;  
 Main spring;  
 Trigger;  
 Trigger spring;  
 Fore end;  
 Fore end cap;  
 Receiver;  
 Locking bolts;  
 Locking bolt pin (male);  
 Locking bolt bushing;  
 Stock;  
 Heel plate;  
 Many screws.

**REVOLVERS AND PISTOLS:**

Many parts, as in the case of rifles and shot guns.

**CANNON:**

Gun proper;  
 Breech mechanism, consisting usually of  
 Breech block;  
 Mushroom;  
 Gas check rings;  
 Gas check pad;  
 Mushroom nuts, washers and springs;  
 Carrier;  
 Rotating gear;

Lever handle;  
Hinge bolt;  
Frequently many other parts.

MACHINE GUN:

The machine gun contains most of the parts of a rifle, and many others, chiefly connected with the automatic features.

Torpedo tubes;  
Racks;  
Oil engines;  
Ignition system;  
Oil tanks;  
Camera Lucida;  
Gyroscopic compass;  
Steering engine;  
Air pump;  
Water pump;  
Compressed air tanks;  
Valves and fittings;  
Manometers;  
Pressure gauges;  
Engine room signal system.

The profits derived from the sale of every one of the above parts were hit by the act. They were what were aimed at by Congress. It was a large target. The lower Court seems utterly to have ignored the existence of the above parts as the natural basis for the application of the act to "parts."

A. H. WINTERSTEEN,  
CHADBOURNE, BABBITT & WALLACE,  
*Attorneys for Petitioner.*

## APPENDIX.

**PARTIAL LIST OF CLAIMS PENDING AT DATE OF DECISION OF PRESENT CASE BY CIRCUIT COURT OF APPEALS,  
JUNE 9, 1919.**

NAME OF CLAIMANT	AMOUNT OF TAX YEAR	MATERIAL	JURISDICTION		STATUS
			U. S. Circuit Court of Appeals	U. S. Circuit Court of Collector	
Worth Brothers Company . . . . .	\$74,857.07      1916	Rough Shell Forgings . . . . .	U. S. Circuit Court of Appeals	Third Circuit . . . . .	Judgment for Collector,
Forged Steel Wheel Co. . . . .	246,920.18      1916	Rough Shell Forgings . . . . .	U. S. Circuit Court of Appeals	Third Circuit . . . . .	Judgment against Collector reversed.
Carbon Steel Company . . . . .	271,062.62      1916	Rough Shell Forgings . . . . .	U. S. Circuit Court of Appeals	Third Circuit . . . . .	Judgment for Collector.
Carnegie Steel Company . . . . .	1,153,526.80      1916	Rough Shell Forgings . . . . .	Commissioner of Internal Revenue	Undetermined.	
Carnegie Steel Company . . . . .	742,258.90      1917	Rough Shell Forgings . . . . .	Commissioner of Internal Revenue	Undetermined.	
National Tube Company . . . . .	310,220.93      1916	Rough Shell Forgings and Air Flask Forgings . . . . .	Commissioner of Internal Revenue	Undetermined.	
National Tube Company . . . . .	71,871.51      1917	Rough Shell Forgings and Air Flask Forgings . . . . .	Commissioner of Internal Revenue	Undetermined.	
Shelby Steel Tube Company . . . . .	15,525.44      1916	Rough Shell Forgings . . . . .	Commissioner of Internal Revenue	Undetermined.	
The Midvale Steel Company . . . . .	217,967.65      1916	Rough Shell Forgings . . . . .	Commissioner of Internal Revenue	Claim rejected by Commissioner.	Suit in Court deferred awaiting allowance or disallowance of this Petition and (if allowed) the determination of the issues by this Court.
The Midvale Steel Company . . . . .	57,174.54      1916	Rough Gun Forgings . . . . .	Commissioner of Internal Revenue	Claim rejected by Commissioner.	Suit in Court deferred awaiting allowance or disallowance of this Petition and (if allowed) the determination of the issues by this Court.
Midvale Steel & Ordnance Co. . . . .	16,287.03      1917	Rough Gun Forgings . . . . .	Commissioner of Internal Revenue	Claim rejected by Commissioner.	Suit in Court deferred awaiting allowance or disallowance of this Petition and (if allowed) the determination of the issues by this Court.

NAME OF CLAIMANT	AMOUNT OF TAX CLAIM	YEAR	MATERIAL	JURISDICTION		STATUS
				Southern District of Ohio, Western Division	District Court of United States for Southern District of Ohio, Western Division	
Dayton Brass Castings Co., . . . . .	18,800.83	1916	Rough Castings for Time Fuses.	Argued and undetermined.	Argued and undetermined.	
Dayton Bronze Bearings Co., . . . . .	7,290.51	1916	Rough Castings for Time Fuses.	Argued and undetermined.	Argued and undetermined.	
Forged Steel Wheel Co., . . . . .	\$107,840.84	1916	Machine Work on Rough Steel Forgings.	Commissioner of Internal Revenue	Undetermined.	
Forged Steel Wheel Co., . . . . .	3,316.57	1917	Machine Work on Rough Steel Forgings.	Commissioner of Internal Revenue	Undetermined.	
Union Switch & Signal Co., . . . . .	51,547.85	1916	Machine Work on Projectiles, Bodies of Shrapnel Shells, Steel Forgings for Base Plates, and Steel Forgings for Rifles.	Commissioner of Internal Revenue	Undetermined.	
Standard Steel Car Co., . . . . .	34,323.56	1916	Rough Shell Forgings.	Commissioner of Internal Revenue	Undetermined.	
Standard Steel Car Co., . . . . .	13,260.71	1917	Rough Shell Forgings.	Commissioner of Internal Revenue	Undetermined.	
Westinghouse Electric & Manufacturing Company., . . . . .	842,671.69	1916	Machine Work on Steel Shell Bodies, Copper Driving Bands, Steel Base Plates, Nose Bushings and Forgings.	Commissioner of Internal Revenue	Undetermined.	
Westinghouse Machine Co., . . . . .	80,207.58	1916	Machine Work on Steel Shell Bodies, Copper Driving Bands, Steel Base Plates, Nose Bushings and Forgings.	Commissioner of Internal Revenue	Undetermined.	
Westinghouse Electric & Manufacturing Co., . . . . .	201,596.33	1917	Machine Work on Steel Shell Bodies, Copper Driving Bands, Steel Base Plates, Nose Bushings and Forgings.	Commissioner of Internal Revenue	Undetermined.	
Curtis & Company Manufacturing Company., . . . . .	260,860.79	1916	Rough Shell Forgings.	Commissioner of Internal Revenue	Undetermined.	
Curtis & Company Manufacturing Company., . . . . .	152,473.06	1917	Rough Shell Forgings.	Awaiting decision before filing claim.		

# In the Supreme Court of the United States.

OCTOBER TERM, 1919.

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WORTH BROTHERS COMPANY, PETITIONER, }  
v. } No. 525.  
EPHRAIM LEDERER, COLLECTOR. }

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.**

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## BRIEF FOR THE UNITED STATES IN OPPOSITION.

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The writ of certiorari is sought to review a judgment of the Circuit Court of Appeals affirming one of the District Court denying petitioner the right to recover \$74,857.07, the amount of taxes paid under protest.

### STATUTE INVOLVED.

The taxes in question were collected under the provisions of section 301 of the act of Congress approved September 8, 1916 (39 Stat., ch. 463, p. 781), the pertinent parts of which are:

SECTION 301. That every person manufacturing (a) gunpowder \* \* \*; (b) cartridges, \* \* \*; (c) projectiles, shells, or torpedoes of any kind, including shrapnel,

loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms \* \* \*; (e) electric motor boats, \* \* \*; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e), shall pay for each taxable year in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: \* \* \*.

It was provided that the tax should not apply to profits received during the year 1916 but derived from articles manufactured under contracts executed and fully performed prior to January 1, 1916, and further, that this section should cease to be of effect at the end of one year after the termination of the present European War.

This act was passed prior to our entry into the war and at a time when all munitions being manufactured in this country were intended for sale to foreign countries and at a time when what was known later as the war excess profits tax had not been levied.

On March 3, 1917, an act was passed imposing additional taxes for the purpose of creating what was styled a "special preparedness fund," (39 Stat., ch. 159, p. 1000). This act imposed an excess profits tax of 8 per cent, but did not disturb the above tax on those manufacturing munitions. In April, 1917, this country entered the war and on October 3, 1917, the first war revenue act was passed. (40 Stat., ch. 63, p. 300.) This act repealed the war excess

profits tax of March 3, 1917, and substituted for it a very much larger excess profits tax, ranging from 20 per cent to 60 per cent. The munitions tax levied by the portion of the act of 1916 above quoted was reduced for the year 1917 from  $12\frac{1}{2}$  per cent to 10 per cent and it was provided that that tax should cease to be of effect on and after January 1, 1918.

It will be seen that the tax in question was a temporary tax intended principally at least to reach the profits derived from the sale of munitions to foreign Governments and was in effect only in the years 1916 and 1917. It will also be observed that the tax was not levied on the articles mentioned or based on their value but was expressly imposed upon those manufacturing them and upon the profits realized by the sale or disposition of such articles.

#### THE FACTS.

The controlling facts appear concisely in the facts specifically found by the district judge and set out in the record as follows:

1. During the taxable year 1916 the Midvale Steel Company was under contract to sell and deliver to the French Government 394,000 high explosive shells of four different sizes to be manufactured according to specifications which were made a part of the contract.

2. The product thus contracted for consisted of two pieces: (1) A shell forged or drawn from steel and finished by the necessary machining and finishing process, and (2) a copper band fitted around the shell for the purpose of guiding it through the rifling of

the gun. But the Midvale Steel Company did not undertake to furnish the fuses and explosives which were to be thereafter put in the shells. In other words, the contract called for unloaded shells.

3. It was provided by the contract that the French Government should "have the right of having one or more inspectors at each of the factories where the shells hereby contracted for and their component parts are being manufactured for the purpose of observing the manufacture thereof and of testing the same at any time before delivery."

4. The specifications made a part of the contract include specifications as to the composition and manufacture of the steel to be used, the forging or drawing of the shell from the steel, the machining and finishing of the shell, and the making and fitting of the copper band.

5. In the manufacture of some of the shells the Midvale Steel Company did all the work, beginning with the manufacture of the steel. But as to others it contracted with the plaintiff to furnish the material, manufacture the steel and forge and draw the shells. This was done according to the specifications above referred to and under inspection of the French Government. When the shells were thus forged and drawn, they were delivered by the plaintiff to the Midvale Steel Company, and that company did all necessary machining and finishing on them and fitted the copper bands around them, and thus further proceeded with and completed the manufacture of the product contracted for.

6. The actual cost of the work done by plaintiff was about 40 per cent of the cost of all the work done on the shells, and the cost of the work done by the Midvale Steel Company was about 60 per cent.

7. The plaintiff's profit, during the taxable year 1916, on the materials furnished and the work done by it as aforesaid was \$598,856.52.

8. The unloaded shell delivered by the Midvale Steel Company to the French Government was the forged or drawn shell delivered to the former by the plaintiff after being subjected to the necessary machining and finishing processes and having a copper band fitted around it.

9. In order to make these forgings, the plaintiff had to provide special machinery at a cost of about \$2,000,000.

10. The forgings themselves as delivered by the plaintiff were specially designed and manufactured to be, when properly machined and finished, used as parts of completed shells. They were not adapted for any other practical use and were not such articles or commodities as are kept in stock and held for sale commercially.

11. During the year 1916 there were a great many companies in the United States engaged in doing some part of the work necessary to the manufacture of shells but not more than two or three, if that many, which began with the steel and did all the work necessary to complete the shell.

12. The plaintiff and the Midvale Steel Company are both owned and controlled by the Midvale Steel and Ordnance Company, a holding corporation.

The facts are therefore substantially these:

The Midvale Steel Company sold to the French Government the unloaded shells in question to be thereafter manufactured. Pursuing a course then in common use it did not itself do all the work of manufacturing the shells. On the contrary, it contracted with the petitioner to furnish the material and begin and conduct the manufacture up to the stage when only the machining and finishing process remained to be done. It then finished the shells and delivered them to the French Government. The result was that the shells were not wholly manufactured by either company but that the two together manufactured them and as a result of the sale each derived a profit. The tax in this case was laid on the profits which the petitioner derived.

#### **QUESTION INVOLVED.**

The sole question involved is whether the petitioner was during the year 1916 a person manufacturing unloaded shells or any part of such shells within the meaning of the act.

#### **THE CONTENTION.**

The petitioner contends that only a person who turns out complete and ready for use a shell or some definite article which, without more work on it, is ready to be used as a component part of the shell is liable for the tax.

The Government contends that where two persons act together in manufacturing shells, one conducting

the manufacture up to a certain stage and the other finishing it, they are both manufacturing the shell and each is liable for a tax on the profits derived by him.

#### BRIEF.

It is respectfully submitted that the writ should be denied because there are no conflicting decisions to be reconciled and the question presented is not one of such gravity, general importance, or doubt as to require this court to assume jurisdiction.

#### I.

The question involved came before the Circuit Court of Appeals in two cases at the same time. The cases came from different districts in the same circuit and the decisions were conflicting. The Circuit Court of Appeals, however, unanimously affirmed the judgment of the District Court in favor of the Government in this case and reversed the judgment of the District Court in the other case. The question has not been before the Circuit Court of Appeals in any other circuit. It is not to be assumed that any other court will hereafter render a conflicting opinion. Certain it is that there are not now conflicting opinions to be reconciled.

#### II.

The tax in question was in effect only in the years 1916 and 1917. Only the comparatively few persons or companies engaged in the manufacture of munitions were affected by it. It appears from the ap-

pendix to the petition that, except this case and two others decided at the same time, only two suits involving this tax have been commenced or are now pending in any court. These two cases are both pending in a district court in Ohio and, together, involve only about \$25,000. It does appear in the same way that a considerable number of claims have been filed with the Commissioner of Internal Revenue, some of which are undetermined and others of which have already been rejected. Whether these claimants will acquiesce in the ruling of the Circuit Court of Appeals in this case and prosecute their claims no further, this court has no means of knowing. If the two pending cases are decided as this case was decided, there will be no conflicting opinions and, unless those who have filed claims with the Commissioner of Internal Revenue choose to prosecute their claims in the courts, there will be no further opportunity for conflicting opinions, since the tax is no longer in effect. It can not, therefore, be said that the question involved is one of general importance. It is of course of importance to the petitioner, as every lawsuit involving large amounts is important to the litigants. It certainly is not important to the Government to have this decision reviewed nor is it a matter of interest or importance to the general public. The object of creating the Circuit Court of Appeals was to relieve this court of some of its burdens by making the decision of that court final in just such a case as this unless it appears that the decision is plainly erroneous.

## III.

The decision in this case, it is submitted with all respect to opposing counsel, is so plainly right that it can not be said to involve such doubt as to require this court to entertain jurisdiction. It was expressly found by the District Court, and the finding is in no way challenged, that the thing which the petitioner manufactured was the body of the shell which, after another company had done the machining and finishing work on it, was delivered by the Midvale Steel Company to the French Government. It is admitted that this shell body was a part of the shell in any possible sense that that word can be used. It is also admitted that the petitioner derived from the sale of the shell a profit to the amount on which the tax was laid. This shell body was not completely manufactured by either of the companies which were engaged in its manufacture. The first stages of manufacture were just as necessary and just as much a part of the manufacture as the last. Every stage of manufacture was subject to the specifications set out in the contract with the French Government and was conducted under the inspection of that Government. In plain English, the shell body was partially manufactured by each company. It was, in fact, manufactured by the two together. One was just as much engaged in the manufacture as the other and in the same sense. The profit derived from the sale was the aggregate amount of profit derived by both. The Midvale Steel Company's profit was the selling price

less the cost of manufacture including what it paid the petitioner for its share of the manufacture. This latter item, of course, included the profit derived by the petitioner and hence this profit is not included in the profit on which the Midvale Steel Company was taxable and, unless taxable to the petitioner, escapes taxation altogether. Since it is found to have been a known fact that but few, if any, companies in this country were at the time of the passage of the act manufacturing shells except in the way adopted in this case, that is, by subcontracting a part of the work, it is not to be presumed that Congress intended to tax only the person or company who happened to put on the finishing touches and to leave untaxed the large profits derived by those doing the remainder of the work, unless the language used can not reasonably be interpreted as meaning anything else.

When we look to the language employed, in view of the known methods of manufacturing, it is absolutely plain that the intention was to reach all the profits derived from the manufacture of munitions. The tax is imposed not merely upon manufacturers of shells or parts of shells, such as shell bodies, but upon "every person manufacturing" them. The word "manufacturing" is the participle of the verb "to manufacture," and is defined as "engaged or concerned in manufacture" (Murray's New English Dictionary). Giving it this meaning, the act reads: "That every person engaged or concerned in the manufacture of shells," etc., and the meaning is

perfectly plain. The manufacturer of the rough shell forging is just as much engaged in the manufacture of the shell or shell body as the manufacturer who finishes it. The tax is not laid merely upon the person who sells munitions but upon all who are engaged in their manufacture and derive profit as a result of their disposition. In this case there was a sale of shells to be thereafter manufactured. As a result of this sale the petitioner manufactured the shells up to a certain stage and disposed of them at a profit to the Midvale Steel Company. The Midvale Steel Company finished them and delivered them to the French Government under its contract, thereby deriving a profit in addition to that which the petitioner had derived. Each was engaged in the manufacture and each derived a profit from the disposition of the manufactured articles.

As held by both of the courts below, the cases dealing with parts of articles under tariff laws are wholly inapplicable. The tariff taxes are levied upon specific articles and are based upon their value. The present tax is an excise tax levied without regard to the value of the article but based alone upon the profit resulting from its disposition. It is not at all necessary, in order to sustain the tax, to hold that the shell body in the shape in which petitioner delivered it to the Midvale Steel Company was a finished part of a shell. It is admitted that this shell body, when finished by the Midvale Steel Company, was in the very strictest sense a part of the shell. This implies, of course, that if the work

done by both the petitioner and the Midvale Steel Company had been done by a single company the tax would apply. The sole question is whether, when this work is done by two instead of one company, the tax will reach the profits made by both or only the profits made by one. It is respectfully submitted that the plain meaning of the words employed by Congress is that the entire profit is to be taxed and nothing can be found in the act to indicate a purpose that the profit derived by anyone who has been engaged in the manufacture of the shell at any stage is to escape taxation. It is difficult to see any ground for the slightest doubt and the Government earnestly insists that there is no such doubt in the case as would justify a review of the unanimous decision of the Circuit Court of Appeals by this Court, and that the writ should be denied.

Respectfully submitted.

WILLIAM L. FRIERSON,  
*Assistant Attorney General.*

September, 1919.



DEC 29 1909

JAMES D. MAHER,  
OLIVER,

No. 525.

OCTOBER TERM, 1909.

IN THE  
**Supreme Court of the United States**

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WORTH BROTHERS COMPANY, Petitioner,

vs.

EPHRAIM LEDGER, Collector of Internal Revenue for  
the First District of Pennsylvania.

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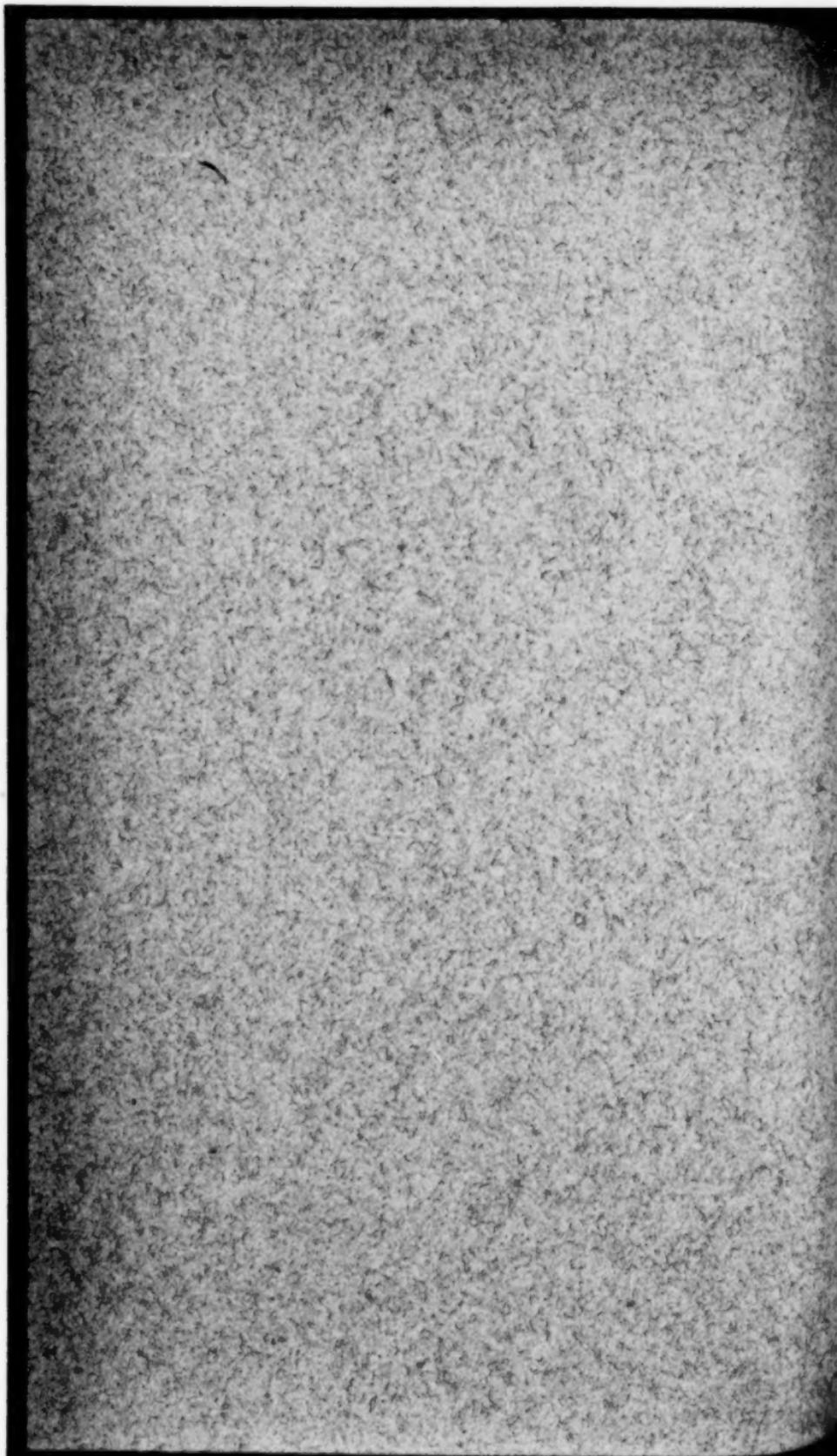
On Writ of Certiorari to the United States Circuit Court  
of Appeals for the Third Circuit.

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**BRIEF OF WORTH BROTHERS COMPANY,  
PETITIONER.**

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# In the Supreme Court of the United States.

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OCTOBER TERM, 1919. No. 525.

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*Worth Brothers Company, Petitioner,*

vs.

*Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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## BRIEF OF WORTH BROTHERS COMPANY, PETITIONER.

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### STATEMENT OF THE CASE.

The case brings to this Court for its construction, as applied to the facts hereinafter set forth, Section 301 of Title III of the Act of Congress of September 8, 1916, 39 Stat. 756, 780, reading as follows:

"That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d) or (e); shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half percentum upon the entire net profits actually received or accrued for said year from the sale or disposition of such article manufactured within the United States."

On October 7th, 1918, the petitioner, as plaintiff, brought an action at law in the District Court of the United States for the Eastern District of Pennsylvania against Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, to recover \$74,857.07, the amount of certain excise taxes exacted of the petitioner and paid by it under protest, which taxes were assessed for the calendar year 1916 under the above section of the Act of Congress.

The petitioner had a large plant at Coatesville, Pennsylvania, where it was manufacturing steel products of various kinds. Upon orders received from The Midvale Steel Company (hereinafter called Midvale)—a corporation of the State of Pennsylvania, and then having a contract with the French Republic for the manufacture, sale and delivery to that Government of high explosive shells—the petitioner in 1916 made for Midvale certain steel forgings which Midvale needed for said contract.

These forgings were rough cylindrical bodies, closed at one end and wide open at the other, developed by the petitioner from the ore stage by six different processes, to a stage on their way to completed shell bodies, which stage, when they finally passed out of petitioner's hands, was 29 stages short of completed shell bodies. The shell body, moreover, was but one out of four distinct parts constituting the completed shell, and the work performed by petitioner was but *one-fifth*—measured by the petitioner's contribution of processes in the development of the material—of the total work required *upon this one* of such four essential parts, to prepare it for assembling with the other parts into the completed shell.

The trial Judge found (*a*) that these shell forgings as made by petitioner were shells or parts of shells within the meaning of the above statute, and (*b*) that petitioner was a person manufacturing shells or parts of shells within the meaning thereof, and he therefore sustained the tax. (Transcript of Record, page 90, fol. 142—page 101, fol. 150; 256 Fed. Rep. 116.) The judgment entered for the defendant Collector was affirmed by the Circuit Court of Appeals for the Third Circuit on June 9, 1919 (Transcript of Record, page 107, fol. 170—page 114, fol. 181; 258 Fed. Rep. 533).

With the later stages of further production required (1) in the remaining 80 per cent. of manufacture of the shell body, and (2) in the entire production of the other *three distinct parts* constituting the completed shell and the processes involved in them, which were all performed by Midvale, in the case of the shell body alone, the petitioner had nothing to do. These *later* processes included the following, as found: Cutting to proper length; lathing and boring to proper inside and outside diameter; forging to produce the ogival head (otherwise called nosing in); annealing; hardening; machining to proper contour; machining and hard finishing the threads at the nose and shoulder and thread within; finishing, sand blast-

ing, and other processes to render the surface smooth and clear of scale and roughness. They involved, among other things, material reductions in the outside diameter and the length of the shell forgings; increase in the inside diameter; and very substantial reduction in weight—in the case of the 220 m/m forgings from 351 pounds to 160 pounds. The tensile strength of the metal as delivered by the petitioner was increased by Midvale from 85,000 pounds to a minimum of 113,750 pounds.

The forgings supplied were intended for development by Midvale into shell bodies—the *shell body, AS FOUND BY THE TRIAL JUDGE* being one of four distinct parts of the completed shell of the French type, the other parts being the *copper driving band*, the *nose timing fuse*, and the *high explosive charge* or content. The composite structure became a practicable shell only when the parts were assembled together after elaborate and complete fabrication, and the parts of the shell were capable of association with other parts only after themselves being completely or substantially in a finished condition. But no such assembling could have been successfully attempted, with the shell forgings in the condition in which they were delivered by petitioner to Midvale.

Upon the net profits derived from the sale of the above forgings, as shown in the petitioner's Return, a tax of twelve and a half per centum was imposed, as upon profits received from the sale or disposition of articles included within the scope of the Act.

The action in the Court below was to recover the above tax after the usual course was taken of submitting to the Commissioner of Internal Revenue a Claim for Refund, and it being rejected. The case was tried in the District Court upon an Agreed Statement of Facts, and upon certain evidence given in explanation of the product and processes of manufacture—a jury trial being waived.

With the petitioner's case in the Circuit Court of Appeals there was argued another case in which precisely the opposite conclusion had been reached, to wit, the case of C.

*G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Plaintiff in Error, v. Forged Steel Wheel Company, Defendant in Error*, brought on writ of error from a judgment in favor of that corporation in the District Court of the United States for the Western District of Pennsylvania, after trial before District Judge Thomson, on January 2nd and 3rd, 1919. That case was essentially identical with the petitioner's case, excepting that it involved material fabricated for incorporation into shells of a smaller size. The trial Judge gave binding instructions for the plaintiff, whose position was like the position of your petitioner upon the issues, and, in an Opinion on the defendant's motion for a new trial subsequently filed, definitely found for the plaintiff, holding that the plaintiff was not a person manufacturing shells or any part of shells within the meaning of the Act. A copy of the Opinion so holding will be found at page 149 of the Transcript of Record in *Forged Steel Wheel Company, Petitioner v. Lewellyn, Collector*, No. 526, argued here contemporaneously with the present case.

The situation, therefore, as it existed when the two cases came before the appellate court, was that two District Courts had construed the section of the Act in question, as applied to the same state of facts, in such a way as to reach conclusions diametrically opposite one to the other—one court holding that the income derived from the sale of rough shell forgings was not subject to the tax, and the other court holding directly to the contrary. The appellate court, while affirming the judgment of the Court below in the petitioner's case, reversed the judgment for the Forged Steel Wheel Company in the Western District of Pennsylvania. But one opinion was filed, applying to both cases. (See Transcript of Record, pages 107, fol. 170—118, fol. 188; 258 Fed. Rep. 533.) The opinion covers also the case of *Carbon Steel Wheel Company v. Lewellyn, Collector*, which had been previously argued in the appellate court. The facts in that case have no such relation to those in the two other cases as to make the decision in it determining of the others.

This Court on October 20, 1919, granted petitions for writs of certiorari in all three cases, for review thereof on the merits.

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### THE ESSENTIAL QUESTIONS INVOLVED.

Under the above statute, as related to the facts in the case, the issues here are purely questions of law, and are, in brief, these:

- (1) Were these forgings, as made by petitioner and sold to Midvale, shells or parts of shells within the meaning and intendment of the Act?
- (2) Was the petitioner a person manufacturing shells or any part of shells?

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### SPECIFICATION OF ERRORS.

*First.*—The United States Circuit Court of Appeals for the Third Circuit erred in entering the following judgment against the Petitioner:

"This cause came on to be heard on the Transcript of Record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

"On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed" (Transcript of Record, page 118, Fol. 189).

Said judgment of the District Court was as follows:

"AND Now, March 11, 1919, it is Ordered that judgment in the above entitled cause be entered in favor

of defendant and against plaintiff" (Transcript of Record, page 102, Fol. 160).

*Second.*—The said United States Circuit Court of Appeals erred in not reversing the judgment of the District Court of the United States for the Eastern District of Pennsylvania, which judgment was as follows:

"AND Now, March 11, 1919, it is Ordered that judgment in the above entitled cause be entered in favor of defendant and against plaintiff,"

and in not directing, upon such reversal, that judgment be entered for the Petitioner for the amount of its claim with interest and costs.

*Third.*—The said United States Circuit Court of Appeals erred in holding that the Petitioner, Worth Brothers Company, was taxable under Section 301 of Title III of the Act of Congress of September 8, 1916 (39 Stat. 756, 780), on the profits made by it from manufacturing and selling the rough shell forgings as set forth in the record, which the purchaser from it used as material in making shell bodies for projectiles.

## ARGUMENT.

The argument will be presented in two primary propositions:

### I

**SHELL FORGINGS ARE NOT ANY PART OF SHELLS, AND THE ACT OF CONGRESS DOES NOT TAX THE PROFITS RECEIVED FROM THE SALE THEREOF.**

### II

**THE PETITIONER WAS NOT A PERSON MANUFACTURING ANY PART OF SHELLS, AND IT WAS, THEREFORE, NOT SUBJECT TO THE TAX.**

The statement of the case in the form of the above two propositions is made with a view of having appropriate emphasis given independently to two related conceptions, as applied to the subject matter, *first*, the meaning of the word "part" as used in the statute, and, *secondly*, the meaning of the words "person manufacturing" as used therein.

### I

**SHELL FORGINGS ARE NOT ANY PART OF SHELLS.**

The Court needs no explanation from us of what a modern high explosive shell is. The trial Court (Transcript, page 91, fol. 143), adequately showed it to be, as a whole, a delicate and highly finished, composite piece of mechanism, with its several distinct parts—which the Court found were four in number in the French type of shell—also delicately and highly finished as related to one another and to

the whole structure, in order that they may be assembled together, and in order likewise that, when assembled, the composite structure may serve its purpose as a shell. Obviously, as the Court found, no one of the parts can be of any use for firing purposes without the other parts, and no one part can be associated or combined with the other parts unless each part is at the time finished and completed with reference to its relation to the others in the finished shell structure. Thus the shell body cannot be effectively fired without the copper band. Nor can the shell body and band together be a practical high explosive shell without the fuse and the high explosive content. So also the shell body can not have the copper band hammered or pressed into its face with a view to making a complete, practical shell, without it first being carried to a late stage of completion, and then specifically preparing the shell body for seating the band by elaborate machining and cutting processes. So likewise the fuse can not be attached to the shell body without its being absolutely finished in its constituent parts, and without the shell body itself being developed by elaborate forging, machining, and cutting processes, after the black forging stage, to a full stage of finish, including the nosing, the shaping of the apex, and careful threading to take the thread of the fuse. With these elaborate processes petitioner had nothing whatever to do.

#### FORGING EXHIBITS AND PHOTOGRAPHS.

There were produced in the Court below and offered in evidence by the petitioner, a series of exhibits of samples of the actual material as fabricated, and sold and delivered by it to Midvale, and of the stages of development of this material thereafter by the latter into completed shell bodies; also samples of copper bars to be attached to the shell bodies, and of fuses intended to be screwed into the nose of the shell body when the latter is finished.

There were also offered in evidence by the petitioner three photographs of the material in various stages of development. (Transcript, page 73, fol. 115.) These photographs are reproduced as an Appendix to this Brief. They

represent the material in ten different forms, A to K, inclusive, as follows:

- A. Rough rolled and sliced block for 220 m/m French shell body.
- B. Rough punched, undrawn forging for 220 m/m French shell body.
- C. Rough drawn black forging for 280 m/m French shell body.
- D. Finish bored and rough machined forging for 280 m/m shell body, ready for nosing.
- E. Finish machined 280 m/m French shell body ready for application of rotating band, and rolled copper bar for rotating band.
- F. Finish machined, banded, 280 m/m French shell body.
- G. Section through 280 m/m finish machined French shell body.
- H. Rough drawn black forging for 293 m/m shell body.
- I. Finish bored and rough turned forging for 293 m/m shell body, ready for nosing, and rolled copper bar for rotating band.
- K. Finish machined 293 m/m shell body ready for application of rotating band.

Figures A, B, C, and H represent stages of development of the material prior to delivery by petitioner to Midvale—C and H showing the forgings in their condition when delivered. D, E, F, G, I, and K represent stages of development by Midvale after delivery to it.

An exact sample of the forgings as delivered by petitioner for the 280 m/m shells will be exhibited to the Court; and also a sample of the copper bar, for use as the rotating band, and a sample of a completely fabricated fuse for a smaller type of shell.

In the condition in which the shell forgings were when passing from the hands of the petitioner, they were, of course, not *shells*, since a shell is a composite structure of several parts. They were also, as we contend, not *parts of shells* in any practical or legal sense, because their development was so far short—80%—of the point where they could be related to or combined with any other component of the shell structure, that they could not satisfy any fair

meaning of the shell body unit as entering into the composite shell as a whole.

The Court below, as above stated, found as a fact that a shell of the French type consists of four distinct parts, of which the shell body is one, and that, before these shell forgings could be developed into shell bodies, twenty-nine distinct, important forging and machining processes were necessary to be put upon them. We claim that these shell forgings cannot be considered parts of shells under the act unless Congress, in the language it used in the act, intended to discard, and did discard, both the *natural meaning of the word "part"* as applied to the subject matter, and at the same time *the meaning of the word as established in the numerous decisions* upon similar taxing statutes extending back to 1833. There is nothing in the act or in the history of its enactment which indicates any such intention.

**1. The word "part," interpreted according to its natural meaning, implies a substantially finished part, as related to the whole structure and to the purpose it is intended to subserve.**

The District Court for the Western District, in *Forged Steel Wheel Co. v. Lewellyn* (Transcript in No. 526, page 153), aptly defined the word as follows: "A part of a thing denotes a constituent or fraction of the whole, being synonymous with portion, piece, section, segment or division. A part is a portion taken from the whole and still retaining all the properties of the whole, except only extent."

In Webster's New International Dictionary the word is defined as follows: "One of the portions, equal or unequal, into which anything is divided, or regarded as divided; something less than a whole; a part, quantity, mass or the like, regarded as going to make up, with others or another, a larger number, quantity, mass, etc., whether actually separate or not; a piece, fragment, fraction, member, or constituent."

The shell forgings delivered by petitioner to Midvale could not possibly be considered "a part" \* \* \* *going to make up*, with others, or any other, a larger number, quantity or mass.

The Century Dictionary gives the following definition: "A separate division, fraction or fragment of a whole; a section or division; a piece, as a part of the money; a part of the true cross."

When the whole is a structure made up of assembled or combined units, as in the case of a shell, the word "part," applied to any unit, implies a degree of development in the particular unit sufficient to relate itself to the other units in the structure without further substantial fabrication. Otherwise the word loses all precision, and becomes equivalent to the words "ingredient" or "material composing or making up."

While homogeneity of all the parts of a composite structure is not always necessary, complete relationship of one part to the other is necessary for any one to be considered a "part." In the case of a part of a shell,—the shell body—a piece of steel intended for development into the shell body, is very far from a "part" when it is twenty-nine important stages short of the point of development where it can be associated with anything else in the shell structure to make up a shell. The findings of the trial Judge established conclusively that the shell bodies as finished by Midvale were very different things in many essential features from the shell forgings it bought from the petitioner to make into shells bodies. *It was not merely that the forgings which passed into the hands of Midvale were subsequently subjected to elaborate machining and cutting processes, but they were also wholly changed from their original texture by heating and reforging, to fit them for their ultimate purpose. The constituent elements were unified and made homogeneous by elaborate reforging—homogeneity in the construction of the shell body being perhaps the one thing more than any other necessary to make it available at all for its purpose. From a tensile strength of 85,000 pounds, these forgings were developed to a minimum tensile strength of 113,750 pounds.*

*Without this development alone the forgings would have been absolutely useless for the purpose of being used as parts of shells.*

**2. The decisions of the Courts have settled the meaning of the word "part" as applied to composite structures similar to shells, in harmony with its natural meaning.**

When the Act of 1916 was passed it was the established law that for an article to be subject to a duty or excise and to be taxed as such, or for a part of an article to be subject to such duty or excise and to be taxed as such "part," the article or the part must be in a practically finished state, capable of being used in the condition in which it comes before the taxing authority and without further substantial work thereon, for the purpose for which it is intended—excepting only when the taxing act, by plainest words or implication, declares that the article or the part taxed shall be subject to taxation in the unfinished state; and, in the absence of anything appearing in the Act to the contrary, Congress must be presumed to have intended that the words in which it chose to define the subject matter of this taxation should be given no other meaning than that warranted by the previous Court decisions.

The cases cited by Judge Thomson of the Western District, in *Forged Steel Wheel Co. v. Lewellyn, Collector*, (Transcript in No. 526, pages 152-155) would seem to remove the above proposition from the field of serious debate. Judge Thompson, of the Eastern District, in his opinion in the present case, and the Circuit Court of Appeals, each admit that, under the Acts levying customs duties upon "parts," an article is not subject to a duty as a "part" unless it is in a practically finished condition.

As we regard the distinctions made by the District Judge of the Eastern District and those made by the Circuit Court of Appeals between the meaning of the word "part" in the customs tariff acts and its meaning in the present act, as wholly factitious and without basis in sound reason, it is important that we submit, for this Court's consideration, the

more relevant cases in the great body of law establishing the main proposition in this title.

**Cases establishing that the word "part" in taxing statutes means a practically finished part where there are no qualifying words in the particular statute indicating to the contrary.**

*United States v. Thirty-one Boxes*, 28 Federal Cases, page 56. No. 16465A; Dist. Ct., S. D. New York (1833).

The question was whether pieces of round iron cut to suitable lengths, some being straight, and others curved or bent to a U shape, and which were adapted to be formed into the links of cables, and invoiced as "straight," bent and turned links, and known under those terms in trade and commerce, are dutiable under the description of "cables and parts thereof" as used in the Act of 1824.

Said BETTS, Dist. Judge:

"In seeking the proper interpretation of the phrase 'parts thereof' as applicable to chain cables, we discover at the first step that custom (*norma loquenda* of laws, as well as of society) has affixed a meaning to the first element of the subject (links) essentially variant from its acceptation in the strict sense of the term. A link considered as a substantive article of manufacture, must unquestionably be finished, have every operation performed upon it required to fit it for the use it is destined for; whether round or oval, open or closed, it becomes the link only when the artisan has completed his labor upon it. \* \* \* The evidence very satisfactorily shows that chain cables are imported entire and in fragments or sections of several fathoms in length, which can be united by shackle links, or opening an ordinary link so as to supply the length that may be required, and that such sections of the chain are known in commerce as parts of cables or chains, the part being complete as a chain of itself, but of less length than the cable commonly required.

As this is the denomination the commodity receives from the dealer, the manufacturer and those conversant with it, the presumption is exceedingly forcible that the law of 1824 contemplated those sections as the parts of chains which are made liable to the same duty as the entire chain. *But whether this be so or not, it is very clear to my mind, that in the sense of the Act of 1824, nothing can be deemed part of the chain that is not as to itself, as finished and complete as the entire chain.*"

In the above case, it is to be noted, evidence was offered (an affidavit by the manufacturer) that the articles in question would be fit for nothing but scrap iron unless made into chains.

*In re Blumenthal*, 51 Fed. 76, (Aff'd 1 U. S. App. 680)  
C. C. U. S., S. D. New York (1892).—

The question was whether certain articles consisting of small, highly polished disks of mother of pearl, which were plain on the back, with grooved rings or hollowed out in front, with rounded edges, and with small cavities in their centres, and which, excepting that they were not pierced with holes or shanked through their centres, exactly corresponded in appearance with the ordinary superfine pearl buttons of commerce, were dutiable under the provision for "pearl and shell buttons" contained in paragraph 429 of the Tariff Act of October 1, 1890 (26 U. S. St., page 567). The importer claimed they were dutiable as manufactures of pearl, under the provision for "manufactures of ivory, vegetable ivory, mother of pearl, and shell, or of which these substances, or either of them, is the component material of chief value, not specially provided for in this Act," contained in Par. 462 of the same Act.

The Board of U. S. General Appraisers, upon the evidence produced before them, found that "these articles were small masses of mother of pearl or shell, which had reached such a stage of manufacture that they were unsuitable for use except as buttons; that they were neither shanked nor

pierced, but technically and among manufacturers they were known as buttons; that regarding the claim made before the Board by the importers that these articles were button blanks and dutiable as manufactures of mother of pearl, articles known as "pearl button blanks" were rough disks, as they were sawed out from the shell. There was further evidence that showed that the relative cost in this country of piercing articles like those in suit with holes, so that they would exactly correspond in appearance with the ordinary superfine pearl button of commerce, was about one-twentieth of the cost of the articles themselves.

Lacombe, Circuit Judge, after stating that there had been some evidence given that the articles in question could be used to a substantial extent for other purposes than for the completion of their transformation into buttons, and that how they may be known technically among manufacturers was immaterial, said (51 Fed. Rep. 78):

"The question to be determined here is whether they are 'buttons' within the language of the tariff act,—language which is to be taken in its ordinary meaning, unless it appears that trade and commerce have given some specific meaning to the words employed. Now, although they may stop short of being complete buttons by a very small measure, that circumstance is immaterial; and it is also wholly immaterial with what intent the process of their manufacture was stopped at that point. \* \* \* In *Seeger v. Farwell*, 139 U. S. 608, it was held that the question as to the intent of the importer was wholly immaterial, so long as congress provided that goods in a particular condition should pay a lower rate of duty than goods in another. It was and is the right of the importer, if he so chooses, to put his goods into such a condition for importation here as will enable him to get them in at a lower rate. There is no finding of the Board of Appraisers as to whether the word 'buttons' or the words 'pearl buttons' had a distinct commercial meaning in trade and commerce. According to the usages

of common speech, these articles here are not completed buttons, because they lack the essential element of a device whereby they may be affixed to garments."

The Judge stated that evidence had been given to show that the "buttons" could be glued on cloth, but that it was not satisfactory, and that "such testimony can hardly be considered sufficient to establish the proposition that the articles imported here are now in condition to be fastened to garments for use as buttons; and that being so, it seems to me that they come short of the designation 'buttons,' as used in the trade, and in fact have not yet been sufficiently advanced in manufacture to become the 'buttons' of everyday speech." It was ruled that the articles were properly to be classed as manufactures of mother of pearl.

*T. D. 16977—G. A. 3105*—Before the U. S. General Appraisers at New York (1896)—In re *Protest of Reiss Bros. & Co.* Synopsis of Treasury Decisions, 1896, page 273:

SOMERVILLE, G. A. "The merchandise is designated on the invoice as 'Mana-blockes,' and consists of unfinished or incomplete pipe bowls, composed of meer-schaum. The articles are shaped like pipe bowls and have been so far advanced in manufacture as *probably to be unfit for any other purpose than pipe bowls*. They are incomplete in not being bored out so as to subserve the purpose of pipe bowls in holding tobacco, and also in having no orifice made for the insertion of a pipestem; and the articles cannot be used as pipe bowls or smokers articles in their incomplete condition as imported.

"The goods were assessed for duty at 50 per cent. ad valorem under paragraph 359, tariff Act of 1894, which enumerates 'pipe bowls' of all materials, and all smokers' articles whatsoever, not specially provided for in this Act \* \* \* 50 per centum ad valorem.

"They are claimed to be dutiable at 30 per cent. ad valorem under paragraph 86 of said Act, as 'articles

composed of earthen or mineral substances \* \* \* not specially provided for in this Act,' and not decorated.

\* \* \* \* \*

"We find that the articles in question have not been sufficiently advanced in manufacture to answer the purpose of pipe bowls or smokers articles, and that they are not such in fact."

*United States v. Simon*, 84 Fed. Rep. 154, C. C. U. S. S. D. New York (1897).

India rubber tubing, in meter lengths, colored, chiefly used in making stems of artificial flowers, held dutiable as manufactures of India rubber, and not as *parts* of artificial flowers, not being any *finished part* of an artificial flower.

The opinion of District Judge Wheeler is quoted at length at this point because of its clarity, and also because of its explanation of certain cases in this Court which have sometimes been cited in support of the contention that an article, in order to be taxed as a "part," need not be a finished part.

The Court said:

"This importation is of small India rubber tubing, in meter lengths, colored, the chief use of which is for the making of the stems of artificial flowers. They have been classified as parts of artificial flowers, under paragraph 443 of the tariff act of 1890, against a protest that they are manufactures of India rubber, under paragraph 460. *Cadwalader v. Wanamaker*, 149 U. S. 532, 13 Sup. Ct. 979, 983, and *Magone v. Wiedcerer*, 159 U. S. 555, 16 Sup. Ct. 122, are relied upon to support this decision. The former was one of the hat-trimming cases, and covered materials for hats. The latter was for glasses which had been made for parts of clocks, as to which the case showed '*That the pieces had been cut and manufactured to sizes suitable for clocks, and that the edges had been ground and beveled so as to cause the glass to be ready for fitting into the dials and frames of the clocks, for*

*which the glasses had been in advance prepared; in other words, that the glass was a finished product, ready for use in clocks, without any further labor or preparation whatever.'* The paragraph under which this manufacture was assessed does not provide a duty on materials for artificial flowers, but for *parts of artificial flowers*, which distinguishes this importation from that in the former case; and this tubing is not any finished part of an artificial flower, but is merely a material from which the stems, as such a part of an artificial flower can be made. As this tubing is not a part of an artificial flower, the protest should be sustained. Decision reversed."

This case was cited and followed in T. D. 35578 G. A. 7749.

*United States v. Reisinger*, 94 Fed. Rep. 1002, C. C. A. Second Circuit (1899).

Carbon sticks, 36 inches long, intended for ultimate use in electric lighting, but which require to be cut into suitable lengths, the ends of which must be pointed or ground before they can be so used, held dutiable as articles or wares composed wholly of carbon, not specially provided for, and not as carbons for electric lighting.

*Per Curiam:* "This cause arises under the tariff Act of 1897. The relevant paragraphs are found in Schedule B, 'Earths, Earthenware, and Glass ware,' and read as follows:

"'(97) Articles and wares composed wholly or in chief value of earthy or mineral substances or carbon, not specially provided for in this act, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem;

"'(96) Gas retorts, three dollars each; lava tips for burners, ten cents per gross and fifteen per centum ad valorem; carbons for electric lighting, ninety cents per hundred; filter tubes, forty-five per centum ad valorem; porous carbon pots for electric batteries with-

out metallic connections, twenty per centum ad valorem.'

"It is contended by the collector that the articles are covered by paragraph 98, as carbons, rods, or sticks for electric lighting. Inasmuch as they were 36 inches long, 'which length,' he asserts, 'is equal to three carbons of the extreme length for electric lighting,' the collector assessed them at the rate of \$2.70 per 100 sticks. The board of general appraisers held that they should be classified under paragraph 97. The Circuit Court held that the collector's classification was correct, but that he should have assessed them at 90 cents per 100 only. 91 Fed 638. No testimony was taken in the Circuit Court. The findings of fact returned by the board of general appraisers are supported by the evidence before them, and read as follows:

" '(1) The goods consist of sticks or rods of carbon, imported in lengths, respectively, of 36 inches.

" '(2) The articles are not suitable or capable of being used for electric lighting in the lengths and condition in which they are imported, but, in order to adapt them for such use, it is necessary to cut them up into shorter lengths, to point some of them, and smooth or grind the ends of others.

" '(3) Prior to July 24, 1897 (the date of the present tariff act), carbons of these lengths were not imported into this country. They were then imported commonly in lengths varying from 4½ to 14 inches, and occasionally as long as 16, and perhaps 20 inches; the greater number being 12 inches long.

*"Accepting these findings as correct, we concur in the conclusion of the board that, although ultimately intended for electric lighting, the fact that it is necessary to bestow further labor on them, in order to fit them for such use, precludes their inclusion in paragraph 98. Inasmuch as they are not specifically provided for in paragraph 98, they come within the general phraseology of paragraph 97, being 'articles or*

wares composed wholly of carbon.' This paragraph, it should be noted, is changed from the similar one, in the Act of 1894 (paragraph 86) which was recently considered by us in *U. S. v. Reisinger* (Dec. 7, 1898), 33 C. C. A. 395, 91 Fed. 112, by the insertion of the word 'carbon.' The decision of the Circuit Court is therefore reversed, and that of the board of general appraisers is affirmed."

*Treas. Dec. 21719—G. A. 4590*, Treas. Dec. Vol. 2, p. 615, before U. S. General Appraisers at New York (1899).

The question was whether certain pieces of polished hard rubber about four inches long which, when divided in the centre, are to be made into mouth pieces for pipes, are dutiable as smokers' articles. The lengths were shaped and polished, but after being cut the pieces must be further bored and screws put in to render them suitable for smokers' use.

WILKINSON, G. A.—"The Board held in G. A. 2467 that certain incomplete skeleton cigar cutters, and in G. A. 3405 that certain unfinished pipe bowls, were not smokers' articles. In the present case the lengths for mouth-pieces must be completed by the pipe manufacturer before they can go into the hands of the smoker. We find that none of the goods are smokers' articles, and sustain the claim that they are dutiable at 35 per cent. as 'manufactures of hard rubber' under par. 450, Act of July, 1897."

The above case was cited and followed by the Board of General Appraisers in T. D. 32396 (Abstract No. 28094), 1912, in which the articles in question were unfinished pipe mouth pieces which still had to be joined, fitted to a wooden part, threaded and polished before they were ready to be put into pipes. The Board held that they were no more smokers' articles than would be crude rubber from which they were manufactured; that they were simply articles

from which a smokers' article can be, and eventually will be, made.

*Hunter v. United States.* 134 Fed. Rep. 361, C. C. A. Second Circuit (1904).

LACOMBE, Circuit Judge.—“The articles in question might appropriately be described as ‘envelope blanks.’ They consist of pieces of paper which have been cut by machinery into certain appropriate shapes and sizes which adapt them to be folded so as to constitute envelopes of desired shapes and sizes. They were assessed for duty under par. 407, Act of July 24, 1897, c. 11, Schedule M, Sec. 1, 30 Stat. 189 (U. S. Comp. Stat. 1901, p. 1637), as ‘manufactures of paper, or of which paper is the material of chief value, not specially provided for in this Act.’ It is not disputed that they are manufactures of paper; the only question in the case being whether they have been manufactured into the articles provided for in par. 399 (30 Stat. 188, U. S. Comp. Stat. 1901, p. 1672), which reads as follows: ‘399—*Paper envelopes*; plain, twenty per centum ad valorem; if embossed, printed, tinted or decorated, 35 per centum ad valorem.’

“In common everyday speech the word ‘envelope’ is used as implying the actual case or wrapper, of paper or cloth, in which a letter or the like may be inclosed. *The ‘blanks’ here imported have not yet become such case or wrapper, even though they may be of such shape and size as to unfit them for other purposes. It is still necessary to fold over the flaps, and to apply gum to the edges of some of them, and actually to stick together the sides and bottom flaps. These are substantial steps in the process of manufacture.”*

The articles were held dutiable, not as paper envelopes, but as manufactures of paper.

*Treas. Dec.* Vol. 29, p. 203, T. D. 35697—G. A. 7771  
(followed in Abstract No. 38831 by Board 3, Nov. 22,

1915)—U. S. General Appraisers, New York, Sept. 1, 1915.  
Before Board 3, *In re Protest of United States Express Co.*

HAY, G. A.—“The merchandise in this case \* \* \* consists of a piece of wood which has been roughly carved into the shape and form of a pipe bowl, but incapable of such use in its present condition. According to the testimony a number of steps have to be taken in its manufacture to render it a finished pipe bowl. Duty was assessed upon it by the collector as a pipe bowl under par. 381 of the Tariff Act of 1913, and it is claimed to be dutiable under par. 176 as a manufacture of wood. Under a long line of authorities going back for almost 20 years, the collector's assessment is erroneous. It is true that in *U. S. v. Hanover Vulcanite Co.* (4 Ct. Cust. Apps. 503, T. D. 33919), the Court of Customs Appeals reversed this board in a case involving unfinished rubber pipe stems, but that case is not directly in point in the case at bar. It was heard and decided by the Court of Customs Appeals *ex parte*, that is, the importer was not represented, and the authorities were apparently not called to the attention of the court. The case of *Reiss Bros. & Co.*, G. A. 3405 (T. D. 16977), is almost directly in point, except that the merchandise was meerschaum instead of wood. It was however advanced to practically the same stage as that which is the subject of this protest. The question was there thoroughly considered and the authorities reviewed, the board holding ‘*That the articles in question have not been sufficiently advanced in manufacture to answer the purpose of pipe bowls or smokers' articles, and that they are not such in fact.*’ *Reiss Bros. & Co.* case, *supra*, has been followed by this board in a number of cases, notably, *The Metropolitan Tobacco Co's.* case, Abstract 33384 (T. D. 33695), and *The American Express Co's.* case, Abstract 33385 (T. D. 33695).”

T. D. 33695. (Abstract No. 33385) 1913.—

"Meerschaum blocks which the testimony shows have to be shaped before using as smoker's articles were assessed under par. 475, tariff act of 1909. They were claimed by the importer dutiable as meerschaum, crude or unmanufactured (par. 625). Protest sustained."

*Treas. Dec. Vol. 29, p. 796, Abstract No. 38991—Before Board 3, Dec. 3, 1915. Protest 789523 of Benedict Weiss.*

Pipe bowls, unfinished. Pieces of wood roughly carved into shape of pipe bowls, classified as pipe bowls under paragraph 381, Tariff Act of 1913, are claimed dutiable as manufactures of wood under paragraph 176.

Opinion by Hay, G. A.—The wood in question was found not to have been sufficiently advanced in manufacture to answer the purpose of a pipe bowl. It was held dutiable as manufactures of wood under paragraph 176. G. A. 7771 (T. D. 35967) followed.

Par. 381 of Tariff Act of 1913:

"Pipes and smokers articles; common tobacco pipes and pipe bowls made wholly of clay, 25 per centum ad valorem; other pipes and pipe bowls of whatever material composed, and all smokers articles whatsoever, not specially provided for in this section, including cigarette books, cigarette book covers, pouches for smoking or chewing tobacco, and cigarette paper in all forms, except cork paper, 50 per centum ad valorem; meerschaum, crude or unmanufactured, 20 per centum ad valorem."

Par. 176 of Tariff Act of 1913:

"House or cabinet furniture wholly or in chief value of wood, wholly or partially finished, and manufactures of wood or bark, or of which wood or bark is the component material of chief value, not specially provided for in this section, 15 per centum ad valorem."

The decisions of the Court of Customs Appeals on the subject are not only illuminating but really controlling, as that Court is now the court of last resort in customs classification cases. (Jud. Code Sec. 198, U. S. Compiled Statutes, 1918, Compact Edition, Sec. 1189.) For that reason these decisions, though few in number because of the comparatively recent constitution of the Court, invite separate consideration.

The first case in point was *Fenton v. United States*, (filed April 24th, 1911), 1 U. S. Ct. Cust. Appl. 529. The following was the decision of the Court as stated in the syllabus:

"Small, oval shaped pieces of cork, tapering at one or both ends, and with holes lengthwise through them, would seem, on examination, not to be, and they appear by the uncontradicted testimony, not to be either fishing floats or cork floats, for us in fishing. They are not commercially known as fishing tackle, or parts thereof, nor are they in fact, as it appears, used as such. They are manufactures of cork, and dutiable as such under Paragraph 429, Tariff of 1909."

The following most pertinent language is used by the Court in its decision, at page 532:

"A part of a fishing tackle may well mean a rod or a reel, a hook or a line, and these articles are also in themselves fishing tackle and collectively so designated, but we do not think, in its common, ordinary meaning, the term 'fishing tackle' includes a rod, reel, hook or float that is not in *finished condition*, ready for the angler's use, and the term 'parts thereof' must refer to the *completed article*, whatever it may be, that is also 'ready for use, either alone or in connection with other articles of the angler's outfit. When ready for use, it is a part of the fisherman's tackle, his outfit, one of his implements; but if not in a condition to be used, of course, he cannot use it, and it is not fishing tackle or a part thereof.'

"The official samples, under the evidence, are not ready for the angler's use, and to hold them to be a fishing tackle or part thereof we think would do violence to the ordinary meaning of the words."

One of the latest cases is *Redden & Martin v. United States*, 5 U. S. Ct. Cust. Appl. 485, 489, decided January 15th, 1915. No later cases definitely ruling on the present point have been found. The question involved was whether rough forged scissors blades could be called scissors blades, unfinished. Paragraph 152 of the Tariff Act of 1909 provided for a duty on scissors and shears and blades for the same, finished or *unfinished*. The case was cited at some length by counsel for the respondent in his Brief filed in the trial Court, as if it were authority for his position that a thing can be a "part" of a composite article though in a wholly unfinished condition. He overlooked the fact, however, that the section of the Tariff Act of 1909 under which it arose, as above stated, provided, in terms, that scissors and shears and blades for the same, *finished* or *unfinished*, should be taxed at the rate which the importer challenged. In deciding that the articles were subject to taxation as the Government contended, the Court said (page 489):

"The views above expressed are not in conflict with the decision of this Court, in the case of *Fenton v. U. S.* (1 Ct. Cust. Appl. 529), which is especially cited by appellants. The articles involved in that case were so called cork floats, and the competition was between a provision for 'fishing tackle' and one for 'manufactures of cork.' There was, however, no provision in the Act for '*unfinished*' or '*partly manufactured*' fishing tackle. It appeared from the testimony that the articles in question were not yet finished as floats, but required numerous processes of manufacture before they could be used as such. The Court held that because of their unfinished condition the floats could not be classed as fishing tackle."

After quoting the language of Judge Barber in the *Fenton* case, as above set out, the Court then goes on to say:

"This reasoning would not govern the present case, because the applicable provision for scissors blades expressly covers *unfinished* blades as well as finished ones."

The Court also, in this case, pointed out that under the tariff act then for consideration the articles subject to taxation included wares *partly* or wholly manufactured, whereas in the *Fenton* case, as above shown, there was no provision for taxing *partly manufactured* fishing tackle.

The cases of *Lyon & Healy v. United States*, 4 U. S. Ct. Cust. Appl. 438, and *Richard & Co. v. United States*, 4 *Id.* 470, intervening between the *Fenton* and *Redden* cases, call for comment. The merchandise involved in the former case and whose status came up on appeal, consisted of two classes of material, in two different stages of finish. The first was violin and cello necks of wood, which the Court found were finished ready to be fitted upon the instruments, and violin necks of wood only requiring a little sand-papering to fit them for violins. These articles, the Court held, were "parts" of musical instruments, because they were in a practically finished state. The other type of articles which came before the Court were ivory mouth pieces for piccolos, which were not finished; granadilla wood mouth pieces for flutes, not finished; and mouth pieces for piccolos and flutes made of ivory, cut into lengths and having holes through them, but not complete articles. The Court held that these latter articles were not finished, and not "parts" of musical instruments. While certain language of Judge DeVries, in the opinion of the Court, might be interpreted as indicating that the lack of a necessary destination of the articles as intended for musical instruments, was a factor in his decision that they were not "parts," it is quite plain that the decision was essentially based upon the finding which he definitely made that the articles were not finished articles.

The case of *Richard & Co. v. United States*, involved the consideration of the status of violin finger boards, necks, pegs and bridges of wood, in a practically finished condition. The Court, speaking by Judge Barber, held they were "parts," because they were finished, the Court saying:

"We understand that the evidence establishes, as to each of these articles, that, owing to the various sizes of violins, these parts have been *finished* and *perfected* as far as practicable until it is known what, in size, are to be its companion parts to constitute the finished violin."

The language of the Court in the *Redden & Martin* case, wherein the doctrine of the earlier case in the same Court of *Fenton v. United States* was definitely reiterated and reaffirmed, leads to no other conclusion than that it is the settled law applying to customs duties that an article can not be taxed as a "part" unless it is substantially finished, in the absence of a provision in the taxing act indicating an intention of Congress to treat *unfinished* parts, equally with *finished* parts, as subject to the particular tax.

With the meaning of the word "part" thus settled in decision after decision when Congress came to frame the Act of 1916, and no qualifying words appearing in the Act showing any Congressional intention to have the subject matter of the tax embrace unfinished material in course of development into parts of shells or other articles specified in the statute, the inference becomes a necessary one that such raw products as shell forgings, twenty-nine stages short of completed shell bodies were not intended to be within the scope of the act.

**3. Shell forgings are not "parts" of shells according to the Treasury Department's own definition of the word "part," in construing the Revenue Act, and certain of its rulings thereunder.**

In Article XHI of Treasury Decision 2384 (See Stipulation of Agreed upon Facts, Transcript, page 22, fols.

33-34), the Commissioner of Internal Revenue, defining the word "part," says:—

"'Any part thereof' as used in Section 301 of this Title is any article *relatively complete* (italics those of the Commissioner himself) within itself, and designed or manufactured for the special purpose of being used as a component part of a completed munition, and which, by reason of some peculiar characteristic, loses its identity as a commercial commodity, and which, without further treatment, cannot be used for any purpose other than that for which it was designed."

The Commissioner, in the italicized portion of the above language (his own italics), has himself fixed the point in the stage of its manufacturing development at which material designed to go into a munition, becomes part of the munition itself. It must be *relatively complete*. By "*relatively complete*" is of course, meant complete as related to the other parts with which it is to be associated by assembling or attachment, and also as related to the munition as a whole. In other words, to be "*relatively complete*," the article must be so developed at the stage when its status comes up for consideration, that in its then form as well as substance, quantitatively and qualitatively speaking, it can be physically related to and combined with other articles to form the composite thing known as a munition. The words "*relatively complete*" do not mean *partially complete*. The words "*relatively*" and "*partially*" convey different ideas. Nor do the words mean *approximately complete* or *substantially complete*. It is the idea of relativity to other parts that the word conveys. The Commissioner's entire phrase is "*relatively complete within itself*." The words "*complete within itself*," as descriptive of an article, mean nothing whatever as bearing upon the present inquiry. Every article, however crude and undeveloped is complete within itself as an *article*. It is only when the significance of the word "*relatively*" is taken into account in association with the word "*complete*" that the

whole phrase carries a concrete or, indeed, any definite meaning. Then it becomes a real, living phrase, with the idea central in it that the thing under definition must have a completion, related, in respect of its degree of finish, to the things to which it is to have a relation by juxtaposition or combination of parts, so that all the parts can, and at that time, be associated together, to carry out the ultimate, practical purposes of the manufacture. This means, of course, in the case of a shell, that, for a rough forging intended to be developed into a body for a shell to be regarded as a "part" of a shell, it must, when it comes up for consideration as a shell body, be developed to the extent that the copper band can be put upon it, that the fuse can be screwed into its nose, and that, when these parts are associated with it in its then stage of development, the loading charge can be placed inside of it, and it can then be fired as a shell. To contend that that could be done with the rough forgings involved in this case, in the condition in which they were when delivered by the petitioner to Midvale, is to contend for a palpable absurdity.

The idea of relative completeness as a necessary feature of the article, runs through the whole of Article XIII of the Treasury Decision we are considering. The Commissioner excludes from "parts" of munitions, stock or commercial commodities purchased in the general trade or open market, unless "they are manufactured specially for, and sold to a manufacturer to be, by him, incorporated in and made an essential part of any munitions." But even as to stock or commercial commodities so specially manufactured and sold, the article must be *relatively complete*, that is, complete as related to the thing of which it is to constitute a part. The fact that the article is designed and specially manufactured to go into a munition, does not make the article a "part." Iron ore may be dug from the ground, developed into pig iron in the blast furnace, manufactured into ingots in the open hearth furnace, sliced into billets, pierced, and drawn into particular shapes, with the definite

purpose in view, through all the processes, to have the material made ultimately available for incorporation into and made an essential part of any munitions. It could not, however, be contended that the material back to the ore stage is a "part" of the munition into which it subsequently goes. Such a contention would be equivalent to the claim that Congress, in establishing the Munitions Manufacturers Tax and imposing a tax upon the profits derived from the manufacturer of "parts" of munitions, intended to use the word "part" as equivalent to "ingredient." While it is true, in a sense, that every unit of matter entering into a shell, is a part of the shell in the sense that it is one of the ingredients of the shell, it is not in that sense that the word "part" was used in the tax statute. If that were the case, it would follow, as above pointed out, that all the materials composing the shell, back as far as the ore when dug from the ground, must be considered as "part" of the shell.

It is quite clear why the Commissioner, in his decision, treats a stock or commercial commodity as part of a shell, if manufactured specially for and sold to a manufacturer who subsequently incorporates it as an essential part of a shell. Such stock commodity is, of course, a part of a shell *if, as and when sold to the munition manufacturer, it can, without material change in it, be used as a part,* and the manufacturer of the stock commodity ought not to be relieved from the munitions tax upon it as it goes into the shell merely because it could also be used for some general commercial purpose other than for use in the manufacture of a shell. The article, however, as above shown, must be a *relatively complete* article, practically ready to be combined with other articles as and when sold, to make up the shell, or it can not be treated as a "part" of a shell. Otherwise the munitions tax would not be what it purports to be, namely, a tax on munitions and parts thereof, but a tax on the materials entering into munitions.

Certain later rulings of the Commissioner of Internal Revenue are most pertinent in this connection.

Section 600 (f) of the Act of October 3rd, 1917, 40 Stat. 316; U. S. Compiled Stat. 1918, Compact Edition Sec. 6309 3/4a, imposes an excise tax of three per cent. "upon all \* \* \* golf clubs \* \* \* games and parts of games." The Commissioner in Treasury Decision 2547, of October 26th, 1917 (see Corporation Trust Company's War Tax Service 1917, pages 1207-1208) rules upon the following question:

*Question:* "In the case of parts of golf clubs sold to golf professionals in the rough, that is iron heads, wooden heads, leather straps for handles and shafts and these separate parts are assembled by the professional and the completed club sold by him, who is the manufacturer of the golf club and when is this tax payable?"

*Answer:* "Iron heads, wooden heads, etc. are not golf clubs, neither are they parts of games within the meaning of the statute. *The one who produces the finished product is the manufacturer and is charged with the tax.*"

Section 600 (g) of the Act imposes a tax of two per cent. upon manufacturers of certain compounds intended to be used and applied for toilet purposes. Deputy Commissioner G. E. Fletcher, in a letter to Alexander, Cohn & Sondheim, dated November 14th, 1917, (see War Tax Service, 1917, page 1215) ruled as follows:

"You are advised that where goods manufactured by a person require further manufacture before being used by the consumer, *the one completing the manufacture is liable for the tax.*"

## II

THE PETITIONER WAS NOT A PERSON MANUFACTURING ANY PART OR PARTS OF SHELLS.

The point presented under this head is that a person can not be deemed a *manufacturer* of an *article* or a *part* unless he *completes* the article or the part—the fundamental idea of a manufactured article being that it must be so nearly completed as to be serviceable for the purpose for which it is designated. Short of development to that condition, it is not a *manufactured*, but merely a *partly manufactured* article.

The point was convincingly discussed by Judge Thomson of the Western District in the *Forged Steel Wheel Co.* case (Transcript in No. 526, pages 152-155). No elaboration of his views is necessary. They are supported by many authorities in addition to those cited by him.

The proposition which the cases establish is this:

THE FUNDAMENTAL IDEA OF A MANUFACTURED ARTICLE IS THAT IT MUST BE SO NEARLY COMPLETED AS TO BE SERVICEABLE FOR THE PURPOSE FOR WHICH IT WAS DESIGNED.

In *United States v. Potts*, 5 Cranch. 84 (1809), the question was whether round copper plates, turned up at the edge, and intended to be made into cooking utensils, were manufactured articles or raw copper.

Chief Justice Marshall says (page 287):

"From the facts stated, the copper in question cannot be deemed manufactured copper, within the intention of the legislature."

In *Lawrence v. Allen*, 7 How. 785 (1849), the question was whether certain rubber imported was manufactured or

unmanufactured India rubber. It appeared that it was customary to dip crude clay models, representing a shoe, in the sap of the tree and by evaporation let it harden and then, by breaking out the clay, one would have a crudely shaped shoe, and that it was the habit of importers in the United States to import rubber in this shape, which they used in subsequent manufacture of articles, including India rubber shoes, which were made to suit the American and European markets in entirely different ways, and which involved the remelting of the rubber shoe, which was imported, and using it simply as a raw material. It appeared, however, from the evidence that the India rubber shoes imported were in a condition that they could be worn without further labor upon them and were made for the purpose of being worn and were often actually worn in this form. It was held that they were dutiable as India rubber shoes because they were a completely manufactured article, and the fact that it might suit some manufacturers' convenience to use them as a raw material was not controlling.

Justice Woodbury says (page 794), speaking of the more modern idea attached to the word manufacture

\* \* \* "it is making an article, either by hand or machinery, into a new form, capable of being used, and designed to be used, in ordinary life."

This Court has repeatedly, in cases involving the subject in its various aspects, affirmed and applied Justice Woodbury's above definition of the word "manufacture," as it has also established the meaning of the words "manufactured article" as essentially implying a complete transformation of material into a product having a distinctive name, character and practical use. See *Hartranft v. Wiegmann*, 121 U. S. 600, 615 (1886); *DeJonge v. Magone*, 159 U. S. 562, 568 (1895); *Anheuser-Busch Brewing Association v. United States*, 207 U. S. 556, 562 (1907); *Robertson v. Gerdan*, 132 U. S. 454 (1889); *Worthington v. Robbins*, 139 U. S. 337, 338 (1890); *Saltonstall*

*v. Wiebusch*, 156 U. S. 601, 603 (1894). See also *United States v. Semmer*, 41 Fed. Rep. 324, 326 (1890).

*Tide Water Oil Co. v. United States*, 171 U. S. 210 (1897), is a leading case and is known as the "Box Shook Case."

The Court observes (page 217):—

"\* \* \* the finished product of one manufacture thus becoming the material of the next in rank."  
\* \* \*

"It is not always easy to determine the difference between a complete and a partial manufacture, but we may say generally that an article which can only be used for a particular purpose, in which the process of manufacture stops short of the completed article, can only be said to be partially manufactured within the meaning of this section."

Again (page 218):—

"It may be said generally, although not universally, that a complete manufacture is either the ultimate product of prior successive manufactures, such as a watch spring, or a penknife, or an intermediate product which may be used for different purposes, such for instance as pig iron, iron bars, lumber or cloth; while a partial manufacture is a mere stage in the development of the material toward an ultimate and predetermined product, such for instance as the different parts of a watch which need only to be put together to make the finished article."

*Allen v. Smith*, 173 U. S. 389, and *Burdon Central Sugar Refining Co. v. Payne*, 167 U. S. 127 (1896), known as the Sugar Bounty Cases, are illustrative of the same proposition, where it was held that the man who completed the manufacture of sugar was the one who was entitled to the bounty.

It is plain from the above that, while the forgings involved in the present case were *manufactured forgings*, they were not *manufactured shells or parts of shells*, because they were only partially manufactured, on their way to their destination as parts of the articles, within the terms of the tax act. These forgings were nothing but *partly manufactured shell bodies or parts—not manufactures of parts.*

*Had Congress intended to make the profits derived from the manufacture of such crude products as rough shell forgings taxable, it would have been easy to specify them under the designation of forgings or material for use in the manufacture of the articles taxed or of any part of any of them.*

### III

#### EXAMINATION OF THE OPINIONS OF THE COURTS BELOW.

It was unequivocally admitted by both the District Court for the Eastern District of Pennsylvania and the Circuit Court of Appeals for the Third Circuit (Transcript, page 98, fol. 154; pages 115-116, fols. 184-185) that the customs tariff cases defined the words we have been considering according to our contention.

Certain distinctions were, however, set up to avoid their application to the case in hand, and both courts, in the course of their respective discussions, presented certain additional views of their own to support their conclusion that the petitioner's case was without merit. The following are the essential positions taken by the lower courts. It was said:

*First.—A distinction exists between the meaning of the word "part" or "parts" in the customs tariff cases and that*

of the same words in internal revenue cases because of differences in the two classes of revenue laws.

*Secondly.*—The tax in question was laid upon the business of manufacturing, as distinguished from being laid upon articles as such, and therefore all engaged in or connected with the manufacture of munitions of war, and deriving profits therefrom as manufacturers, were hit by the statute.

*Thirdly.*—If the tax is limited in its application to manufacturers engaged in the completion of the articles or parts of the articles specified in the statute, it would unduly narrow its incidence, and the purpose of the statute itself.

*Fourthly.*—If the incidence of the tax is limited to those engaged in manufacturing the articles or parts of the articles specified according to the meaning of the word "part" or "parts" as defined in the previous decisions, it would lead to a different measure of liability for this tax assessed against different manufacturers, or against the same manufacturer of different lots of shells, dependent upon what part of the prior stages of manufacture might be done under contract or otherwise by others.

The above propositions will be examined in their order.

**First.—As to the claimed distinction between the meaning of the word "part" or "parts" in the custom tariff cases and that of the same words in internal revenue cases, because of differences between the two classes of revenue laws.**

(1) Judge Thompson of the District Court (Transcript page 96, fol. 150) postulated his main argument against the petitioner upon the distinction he made between a tax laid upon articles as such, as upon a shell or part of a shell, and this excise tax, which he declared to be a tax upon the business or occupation of manufacturing certain

articles or their parts. Although he admitted that the amount of the tax was to be measured by the entire net profits received from the sale of the articles specified, or their parts—thereby, in effect, conceding that if there were no sales of articles or parts, according to their established meaning, there would be no tax—he conceived that because this tax is an excise tax, instead of a tax upon articles, he could stop his judicial inquiry at the point of ascertaining that the tax payer affected was engaged in a particular kind of business related to munitions, without pushing it to the extent of determining whether the product manufactured was within the description of the articles whose sale yielded the income sought to be reached by the Government.

We submit that the distinction between a tax in the nature of a customs duty upon articles or parts and an excise tax upon the business of manufacturing articles or parts is one wholly without a difference, in so far as it has to do with the present discussion.

There is no difference in kind between customs duties and excise duties such as would, even *a priori*, require any different rule of interpretation to be applied in respect of the meaning of "parts" of shells.

"Duties, Imports, and Excises" are *cujusdem generis*. In *Pacific Insurance Co. v. Soule*, 7 Wall. 433, we find, at page 445, the following:

"*Duties* are defined by Tomlin to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than 'taxes.' It is applied in its most restricted meaning to customs; and in that sense is merely the synonym of 'imports.'

"*Imports* is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Conwell says it is distinguished from custom, 'because custom is rather the profit which the prince makes on goods shipped out.' Mr. Madison considered the terms 'duties' and 'imports' in these clauses as synonymous. Judge Tucker thought 'they were probably intended

to comprehend every species of tax or contribution not included under the ordinary terms, 'taxes and excise.'

"*Excise* is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor."

In *Nicol v. Ames*, 173 U. S. 509, involving the Stamp Tax Act of 1898, the Court said, at page 519 (italics ours):

"We think the tax is in effect a *duty or excise* laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act."

In *Patton v. Brady*, 184 U. S. 608, involving a tax on manufactured tobacco, the Court approves definitions of an excise tax as an "inland imposition" or "inland impost" or "inland duty or impost." (At pages 617, 618.)

In *Flint v. Stone Tracy Co.*, 220 U. S. 107, the case upholding the constitutionality of the Corporation Excise Tax of 1909, this Court said, at pages 150 and 151:

"It is unnecessary to enter upon an extended consideration of the technical meaning of the term 'excise.' It has been the subject-matter of considerable discussion—the terms duties, imposts and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution. As Mr. Chief Justice Fuller said in the *Pollock Case*, 157 U. S. 557:

"'Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words "duties, imposts and excises," such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.'

"And in the same connection the late Chief Justice, delivering the opinion of the Court in *Thomas v. United States*, 192 U. S. 363, in speaking of the words duties, imposts and excises, said:

"We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

"Duties and imposts are terms commonly applied to levies made by governments, on the importation or exportation of commodities. Excises are 'taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.' Cooley, Const. Lim. 7th Ed. 680."

The word "duty," in its broader sense of including inland indirect taxes, might just as well have been used as the word "excise" to designate the character of the present tax. If levied at the seaboard upon importations it would have been properly described as a custom duty. If, therefore, we read the act as if it imposed a duty, and not an excise tax, upon persons manufacturing shells or parts of shells, the question would still remain for answer, just as it remains for answer with the tax thought of as an excise tax, *what are parts of shells*—for it is only persons manufacturing the articles or parts of the articles named in the statute who are required to pay taxes on the net profits derived from their sale.

The Judge of the District Court in his opinion (Transcript, page 98, fol. 154), in addition to conceding that if this were a tax levied as a customs duty upon commodities it could not be sustained, also conceded that if laid upon

the article itself, as it is under Title IV Chapter F, Section 6309½ *et seq.*, Compiled Statutes 1918, it would be equally inadmissible.

In his refusal to give controlling, or indeed any, effect to the decisions establishing that a tax on an article or a part means a tax on the finished article or part, on the ground that this tax, as he claimed, is on the business of manufacturing munitions or parts—which does not, according to his contention, require the manufacturing processes to be carried to completion in order to expose the manufacture to the tax—he utterly overlooked the essential fact that *it is only persons who manufacture the various classes of articles scheduled, or the parts thereof, who are taxed*, and that they are *then not taxed on their manufacturing operations or products generally, but only on the profits derived from the sale of the articles or "parts."* That, of course, means that, even if the tax is to be treated as a tax on the business of manufacturing, it reaches nothing to levy upon until it appears that the manufacturer has made finished articles or made finished "parts," and has derived profits from their sale.

(2) The Circuit Court of Appeals (Transcript page 117 fols. 186-187) set up a distinction between customs tariff laws and internal revenue laws such as the present, in the conception that the former are designed to protect domestic industry, with revenue as an incident, while the latter are primarily intended to raise revenue, and therefore the settled meaning of words in one class of statutes may properly be ignored in construing the same words in the other. The Court in effect said—and based its conclusion to a large extent thereupon—that because, as it observed (we believe erroneously), the purpose of the customs tariff legislation was to encourage and protect domestic industry, the meaning of the words we are now considering, thoroughly settled as their meaning is in cases arising under such legislation, must be understood as limited to their relationship to such cases, and cannot be extended beyond them to cases where the "tariff for protection" theory does not apply.

We point out, in answer to the above:

(a) That the cases fixing the meaning of the word "part" in a composite article run back well into the era of the prevalence of the "tariff for revenue" doctrine, and that in no case has it been asserted, or made a *ratio decidendi* that the meaning of the word is to be determined with a view to having it fit in with any "tariff for protection" view.

See the early case of *United States v. Thirty-one Boxes*, 28 Fed. Cases 56 (1833), arising under the Tariff Act of 1824, above cited (page 14).

The ground of the decision was that the natural meaning of the word "link" as related to a chain, of which the material when finished was destined to become a part, excluded the material in an unfinished condition from being adjudged a "part" of the claim—for the reason that a part "denotes a portion taken from the whole and still retaining the properties of the whole, less only the extent."

In none of the later cases where the word "part" has come up for interpretation, so far as we have been able to find, has anything but resort to the natural meaning of the word been found necessary to interpret it—excepting only when Congress in terms or by implication, in enacting any particular statute, divorced the word from its natural meaning. This is in accord with the settled doctrine that the natural, obvious meaning must be given to the language of a statute where there is no ambiguity in it. *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 36.

(b) We further point out that the lower Court was wholly in error in its assumption that the meaning of the words we are considering was fixed for it exclusively in the customs tariff cases, and that that meaning must be confined to such cases. See *Burdon Central Sugar Refining Co. v. Payne*, 167 U. S. 127, and *Allen v. Smith*, 173 U. S. 389.

In the latter case a contest arose as to which of two parties was entitled to the sugar bounty given to the pro-

ducer of sugar—the grower of the cane or the man who produced or manufactured the finished sugar. Obviously, with that the contest, and neither the United States nor one of its Collectors a party, the occasion presented itself for definition of the words "manufacture" and "manufacturer" free from any theory of interpretation based upon customs tariff policies. Both the contestants were claiming the bounty, and it belonged to one or the other, and discussion of the theory of the Bounty Act, much less of the Customs Tariff laws, was unnecessary in arriving at the meaning of the words defined.

This Court, however, resorted to the customs tariff cases for a definition of the words, and ruled the case upon their authority. We have quoted certain language used by Mr. Justice Brown in the above case at page 35, *supra*, and refer to it at this point.

The case of *Tide Water Oil Co. v. United States*, 171 U. S. 210, involving a claim of right to a drawback under the provisions of R. S. 3019 (Comp. Stats. page 6829), cannot properly be treated, as the Circuit Court of Appeals in its opinion treated it, as if it decided that only where encouragement to domestic manufacture is involved in the purpose of a statute must the word "manufacture" be confined to the finished article. The language of the Court quoted at page 35, *supra*, clearly shows that the Court intended to recognize and did recognize and adopt as of general application the distinction between a *partial manufacture* and a *manufacture or complete manufacture*.

In cases which have arisen under the bankruptcy or insolvency laws, the definitions in the customs tariff cases have also been followed and applied, thereby further showing the general application of the definitions fixed by those cases.

See *in re Rheinstrom & Sons Co.*, 207 Fed. 119, 130, 135, 136 (1913). *Central Trust Co. v. Lueders*, 221 Fed. 829, 838 (1915).

**SECONDLY.**—The tax in question was laid upon the business of manufacturing as distinguished from being laid upon articles as such, and therefore all engaged in or connected with the manufacture of munitions of war, and deriving profits therefrom as manufacturers, were hit by the statute.

The trial Judge, whose language was adopted by the Appellate Court (Transcript page 116 fol. 185) said:

"The clear purpose of the act is through taxation of the business or occupation of manufacturing munitions of war to reach the profits of all those engaged in such manufacture whether engaged in manufacturing to completion or *engaged in any part* of such manufacturing."

The plain meaning of the above language is that, in the view of the lower courts, every person *taking part in the manufacture* of material in process of development into the articles specified or any part thereof was within the grasp of the statute.

How far away the above view is from the proper construction of the statute, will be seen when the words of the act themselves are read as they are written, and not as they were paraphrased by the courts below.

While it is true that the tax is upon profits derived from the business of manufacturing, and is specifically laid upon every person manufacturing, it *nowhere appears in the statute that all persons doing work as manufacturers upon material intended for and subsequently entering into munitions of war, and deriving a profit therefrom, are subject to the tax.* The act, after naming a number of articles constituting its subject-matter, plainly declares that the tax shall be paid from the net profits received or accrued "from

the sale or disposition of such articles," and shall be paid by every person manufacturing any of such articles or any part of any of the articles.

There is clearly here as definite as possible a limitation of the reach and scope of the Statute to those persons who manufacture the *articles specified or any part of any of them.*

The statute was never meant to tax one who performed but part of the work essential to producing a single one of four distinct parts of the completed shell.

It follows therefore that no person whose product is not one of the manufactured articles specified, or a manufactured part of any of them,—as the word "manufacture," (as meaning a completed fabrication), and as the word "part," (as meaning a completed part), had been defined for the lawmakers in countless decisions—can possibly be within the statute's reach.

If the purpose of the act were as broad as asserted by the lower courts, it would follow that it was intended to reach every manufacturer whose material goes into munitions, but that interpretation was most definitely excluded by the draftsman of the act and by Congress itself, as will appear from the following history of this legislation:—

#### THE HISTORY OF THE ENACTMENT OF THE ACT SHOWS THAT IT WAS NOT THE INTENTION OF CONGRESS TO TAX THE MANUFACTURER OF THE MATERIALS ENTERING INTO THE COMPOSITION OF MUNITIONS.

The Munition Manufacturers Tax Bill, as is well known, was the subject of long debate in Congress. Originally the section of the bill which described the lines of business upon which it was intended to impose the tax, was considerably longer and more elaborate and complex than in the final form adopted. During the course of the discussion of the bill in its original form, the following amendment was

offered as a substitute for the corresponding section of the original bill:—

"SEC. 41: (1) That every corporation manufacturing (a) gunpowder and other explosives; (b) cartridges loaded and unloaded, caps or primers; (c) projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses or complete rounds of ammunition; (d) fire arms of any kind and appendages, including small arms, cannon, machine guns, rifles and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e) shall pay for each taxable year an excise tax of ten per cent. upon its entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States.

"(2) And every corporation selling or manufacturing for any corporation mentioned in paragraph (1) any material entering into and used as a component part in the manufacture of any of the articles enumerated in (a), (b), (c), (d), (e) or (f) shall pay for each taxable year an excise tax of five per cent. upon its net profits actually received or accrued for said year from the sale or disposition of such material so entering into or used as a component part in the manufacture in the United States of the articles so enumerated as aforesaid." (See page 13491 Congressional Record for 1916.)

This amendment was debated at length. Sub-section (1) was modified in some details and finally adopted, but sub-section (2), purporting to tax the material entering into the manufacture of munitions was rejected. Motion was made to strike out sub-section (2), (see page 13492) and the motion prevailed. (See page 13511.) After sub-section (2) had been stricken out and sub-section (1) modified to some extent, the amendment was adopted in lieu of the corresponding section in the original bill. In view of the above

action of Congress, it is clear that there was no intention by the legislation to tax manufacturers of materials entering into munitions.

We are therefore driven back to the plain words of the statute, as adopted, to find its purpose. We have already shown the established meaning of its words. Its purpose should not be sought anywhere outside of them.

**THIRDLY.—If the tax is limited in its application to manufacturers engaged in the completion of the articles, or parts of the articles specified in the statute, it would unduly narrow its incidence, and the purpose of the statute itself.**

The language of the trial Judge was as follows (Transcript, page 96, fol. 151).—

"As the tax is laid upon the business or occupation of manufacturing, the inquiry therefore is whether 'any person manufacturing' includes only such persons manufacturing as bring the article manufactured to the finished condition where it is adapted for use as a part of a shell, or whether the term includes any person manufacturing the article in any one or more of the successive steps substantially necessary to bring it to that condition. If the former construction is to prevail, at which of the steps does the manufacture begin? If it is held that it does not begin until the manufacturer who brings it to its finished state commences his work, it would follow that if the process of manufacture were distributed among a number of manufacturers, each doing a part of the manufacturing, the payment of the tax would be confined to that manufacturer who contributed such final steps as would bring the article to its completed state of adaptability to the purpose intended. I do not think the language of the Section justified an interpretation which would lead to nullifying its purpose."

It is sufficient to say, in answer to the above, that *the real question is not as to the effect of the act, but as to the meaning of the act as it exists*, because the various customs tariffs acts, as we all know and as has been often said by the courts, include within their reach only those articles and parts of articles, and those persons importing them, as the language of the acts declares they are intended to reach. As was said by Judge Lacombe in *In re Blumenthal*, 51 Fed. Rep. 76, in which case it was decided that disks of mother of pearl not absolutely finished and capable of being used as buttons, were not subject to duty as buttons:—

“Although they may stop short of being complete buttons by a very small measure, that circumstance is immaterial; and it is also wholly immaterial with what intent the process of their manufacture was stopped at that point.”

We may similarly say in this case that it is of no significance, in the construction of the present act, that a particular class of manufacturers are relieved from being taxed under it, if it must be given an interpretation according to the precedents which would exclude them.

Millions of dollars have been left in the hands of importers which might have been taken in customs duties under our various tariff acts, in the course of their administration, because, as the courts have held, Congress, in the language it used to impose taxes upon “parts,” did not reach the goods as imported.

The necessity of the Government for revenue, which has always been present, has never yet appealed to the courts as much of an argument in favor of the courts themselves rewriting any particular acts, in disregard of their own prior decisions.

**FOURTHLY.—If the incidence of the tax is limited to those engaged in manufacturing the articles or parts of the articles specified according**

to the meaning of the word "part" or "parts" as defined in the previous decisions, it would lead to a different measure of liability for the tax assessed against different manufacturers, or against the same manufacturer of different lots of shells, dependent upon what part of the prior stages of manufacture might be done under contract or otherwise by others. (Transcript, page 96, fol. 151.)

All that need be said in this connection is that practically the same objection could be made against the limitation of the incidence of customs duties according to the terms of the statutes imposing them. It could be said of every tariff act which places a duty on "parts" of articles that unless the duty is collectible on unfinished as well as finished "parts," a different measure of liability to the duty would exist against different importers or against the same importer of different importations of the same class of articles dependent upon the condition of the thing imported. But that circumstance has never yet been considered as warranting the courts in sustaining duties upon "parts" of imported articles when the particular tariff act does not specifically declare them to be subject to duty when unfinished, or when it does not tax the materials entering into the articles or parts of the articles.

An importer may bring in one lot of unfinished material intended ultimately to be developed into "parts" of manufactured articles, and in the same vessel he may bring in another lot of the same class of material wholly finished and intended to be assembled into exactly the same type of manufactured products as the previous lot. The second lot would be dutiable as "parts." The first lot would be free of duty as such. The same result would follow whether the lots were imported by the same person or by different persons.

One of the chief purposes of a customs tariff act is to get revenue. The same purpose is likewise behind the Muni-

tions Manufacturers' Tax Law. The war exigency, which brought about the enactment of the latter law, was utilized by Congress to extend to munitions manufacturers a tax in language whose meaning had already been fixed by decisions under the customs tariff acts. The act necessarily carries with it all that its words fairly warrant, but no more than the decisions upon them will permit.

Congress, knowing the established meaning of the words it used when it framed this law, enacted *their meaning* as well as the words themselves. If it did not so intend, it would have been easy for it to say so.

The argument based on the diversity of situations arising under the act, or the difficulty in applying it to different manufacturers of different products or to the same manufacturer of the same class of products in different stages, is therefore of no more force in interpreting the act than would be the same argument in interpreting any customs tariff act of the kind.

#### IV

#### THE FUNDAMENTAL ERROR OF THE COURT BELOW.

*The fundamental error of the lower Court was in its conception that the purpose of the statute, as the Court viewed it, controlled its construction, instead of its construction being determined by the meaning of the words used by the lawmakers to carry out that purpose.*

The Court held that the purpose was to tax the profits derived from all such specified articles, or parts thereof, as were either made for war purposes or were withdrawn from the general field of commerce and used for the making of war articles. Conceiving that to be the end sought, the meaning of the essential words of the statute used to accomplish it was made to conform to the purpose found,

the settled meaning of those words being ignored or construed away—with the result that the petitioner was dismissed from court as without a case.

*Our position, on the contrary, was and is that the essential inquiry was not what Congress intended, but what is the meaning of the words it used to express that intent, and that that meaning, when ascertained, not only determines the meaning of the statute but the Congressional intent in enacting it.* That is the settled law laid down by this Court.

In *United States v. Goldenberg*, 168 U. S. 95, 102, the Court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function to legislate, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies \* \* \* justify any judicial addition to the language of the statute."

And in *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 37:

"As declared in *Hadden v. Collector*, 5 Wall 107, 111, 'what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the Court in the

interpretation of statutes.' *Where the language of the act is explicit, this Court has said 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the Legislature. \* \* \** It is not for the Court to say, when the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.' *Scott v. Reed*, 10 Pet. 524, 527."

See also *Dewey v. United States*, 178 U. S. 510, 521.

## V

THE ACT, WHEN ITS ESSENTIAL WORDS ARE GIVEN THE INTERPRETATION FOR WHICH WE ARE CONTENDING, HAS A NATURAL APPLICATION TO A GREAT NUMBER OF COMMODITIES, AND NO NECESSITY EXISTS FOR EXTENDING THE MEANING OF THE WORDS, BY ANY DOUBTFUL CONSTRUCTION, WITH A VIEW TO FINDING SUBJECTS FOR ITS OPERATION.

The Court seriously erred in its approach to the question involved. It discarded the established meaning of the essential words, in the act, on the assumption that that was necessary to its effective operation in raising the revenue desired.

The Court overlooked the very practical operation and wide sweep of the act upon a natural interpretation being given to its language, when all the subject matters covered by it are considered.

The act was considered mainly by the Court as if it meant to tax profits derived only from shells or projectiles and their parts; whereas it included also profits from cartridges, torpedoes, small arms, cannon, machine guns,

bayonets, motor boats, and submarines, and their parts. It is a matter of common knowledge that all the above articles have definite parts—some of them many parts—which are completed in finished form and supplied in the trade to manufacturers of the composite articles, and are also manufactured by munition makers themselves as independent parts and supplied to dealers and other manufacturers.

If the reasoning and conclusion of the Court in this case are sound, then it is just as logical to hold that a person or firm manufacturing the leather or the felt from which a motor boat cushion is made is a manufacturer of a part of a motor boat, and consequently subject to the tax.

The following list is significant:

*List of Distinct Parts of Various Kinds of Articles Mentioned in Section 301 of Title III of the Act of September 8th, 1916, Which Are Commonly Recognized as "Parts" for Assembling or Sale Purposes, and Manufactured and Known in the Art and Trade as Such.*

The various articles mentioned in the above Section are well known respectively to have the following separately purchasable parts:

CARTRIDGES:

- Cartridge case;
- Primer;
- Powder;
- Wad, if any;
- Projectile.

TORPEDOES (Automobile variety):

- War head;
- Practice head;
- Explosive charge;
- Air flask;
- Air flask head;
- Alcohol lamp;
- Propelling engine;

Obry gyroscopic gear;  
Many screws.

**SMALL ARMS—**

**SHOT GUN:**

Barrel;  
Sight;  
Hammer;  
Firing pin;  
Firing pin spring;  
Fore end;  
Trigger;  
Trigger spring;  
Stock;  
Heel plate;  
Lever;  
Lever spring;  
Main spring;  
Bolts;  
Many screws.

**RIFLE (Repeating):**

Barrel;  
Sight;  
Magazine;  
Magazine spring;  
Magazine follower;  
Bolt;  
Firing pin;  
Firing pin spring;  
Extractor;  
Carrier;  
Carrier spring;  
Finger lever;  
Main spring;  
Trigger;  
Trigger spring;  
Fore end;  
Fore end cap;  
Receiver;

Locking bolts;  
 Locking bolt pin (male);  
 Locking bolt bushing;  
 Stock;  
 Heel plate;  
 Many screws.

**REVOLVERS AND PISTOLS:**

Many parts, as in the case of rifles and shot guns.  
**CANNON:**

Gun proper;  
 Breech mechanism, consisting usually of  
     Breech block;  
     Mushroom;  
     Gas check rings;  
     Gas check pad;  
     Mushroom nuts, washers and springs;  
     Carrier;  
     Rotating gear;  
     Lever handle;  
     Hinge bolt;  
     Frequently many other parts.

**MACHINE GUN:**

The machine gun contains most of the parts of a rifle, and many others, chiefly connected with the automatic features.

**BAYONETS:**

Parts probably never sold singly to the consumer, but consisting usually of a blade; two wooden handle parts; burs and rivets.

**ELECTRIC MOTOR BOAT:**

Hull;  
 Motor;  
 Shafting;  
 Bearings;  
 Propeller;  
 Propeller nut;  
 Rudder;  
 Storage batteries;

Steering wheel;  
Tiller ropes;  
Tiller;  
Tiller rope pulleys;  
Reostat;  
Controller;  
Electric wiring;  
Anchor;  
Hawser;  
Side lights;  
Riding lights;  
Water tanks;  
Construction and trimming hardware;  
Fittings, such as  
Cushions;  
Lavatory fixtures;  
Galley stove;  
Refrigerator;  
Cooking equipment;  
Bunks and their equipment;  
Signals;  
Compass;  
Repair tools.

**SUBMARINE BOAT:**

All parts listed for electric motor boats, and in addition

Torpedo tubes;  
Racks;  
Oil engines;  
Ignition system;  
Oil tanks;  
Camera Lucida;  
Gyroscopic compass;  
Steering engine;  
Air pump;  
Water pump;  
Compressed air tanks;  
Valves and fittings;

Manometers;  
Pressure gauges;  
Engine room signal system.

The profits derived from the sale of every one of the above parts were hit by the act. They were what were aimed at by Congress. It was a large target. The lower Court seems utterly to have ignored the existence of the above parts as the natural basis for the application of the act to "parts."

## VI

THE LOWER COURT'S RULING WAS DIRECTLY AGAINST THE WELL ESTABLISHED RULE OF CONSTRUCTION OF TAXING STATUTES, THAT A TAX IS NEVER IMPOSED ON A CITIZEN WHEN THE QUESTION OF HIS LIABILITY IS AT ALL DOUBTFUL.

We have shown, and the lower Court concedes, that the shell forgings here involved were not parts of shells in the ordinary and commonly accepted sense, but were merely partly manufactured parts; and that the petitioner was therefore not a manufacturer of any part of a shell in the ordinary sense.

The natural, obvious meaning must be given to the language of a statute where there is no ambiguity in it. *Bate Refrigerating Company v. Sulzberger*, 157 U. S. 1, 36.

A departure from the natural meaning of the plain language of a statute is not justified by any consideration of its consequences or of public policy. 36 Cyc. 1114.

We claim that the proper construction of this statute is entirely free from doubt, with the above principles kept in mind. If, however, the Court should hold the question to

be doubtful—and we have at least established that much in the foregoing brief—then that doubt should be resolved in favor of the petitioner.

This being a taxing statute, every doubt as to the meaning of its language, or its application to the present case, must be resolved in the petitioner's favor.

Said Caldwell, Circuit Judge of the Circuit Court of Appeals, Eighth Circuit, in *Rice v. United States*, 53 Fed. Rep. 910, 912:—

“The rule for the construction of statutes levying taxes or duties on the citizens is laid down by Lord Cairns, in delivering the judgment of the house of lords (*Partington v. Attorney General*, L. R. 4 H. L. 100, 122) in this language:

“As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an “equitable construction,” certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.”

“Judge Story says:

“It is a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specially pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, be-

cause burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. *Revenue statutes are in no just sense either remedial laws, or laws founded upon any permanent public policy, and therefore are not to be liberally construed.*' *U. S. v. Wigglesworth*, 2 Story, 369.

"And this is the uniform doctrine of the authorities. *American Net & Twine Co. v. Worthington*, 141 U. S. 474, 12 Sup. Ct. Rep. 55; *U. S. v. Isham*, 17 Wall. 496; *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. Rep. 1240; *Powers v. Barney*, 5 Blatchf. 202; *Dean v. Charlton*, 27 Wis. 526; *Suth. St. Const.* 461, 462; *Cooley, Tax'n* (2d Ed.) 266; *Dwar. St. page 749.*"

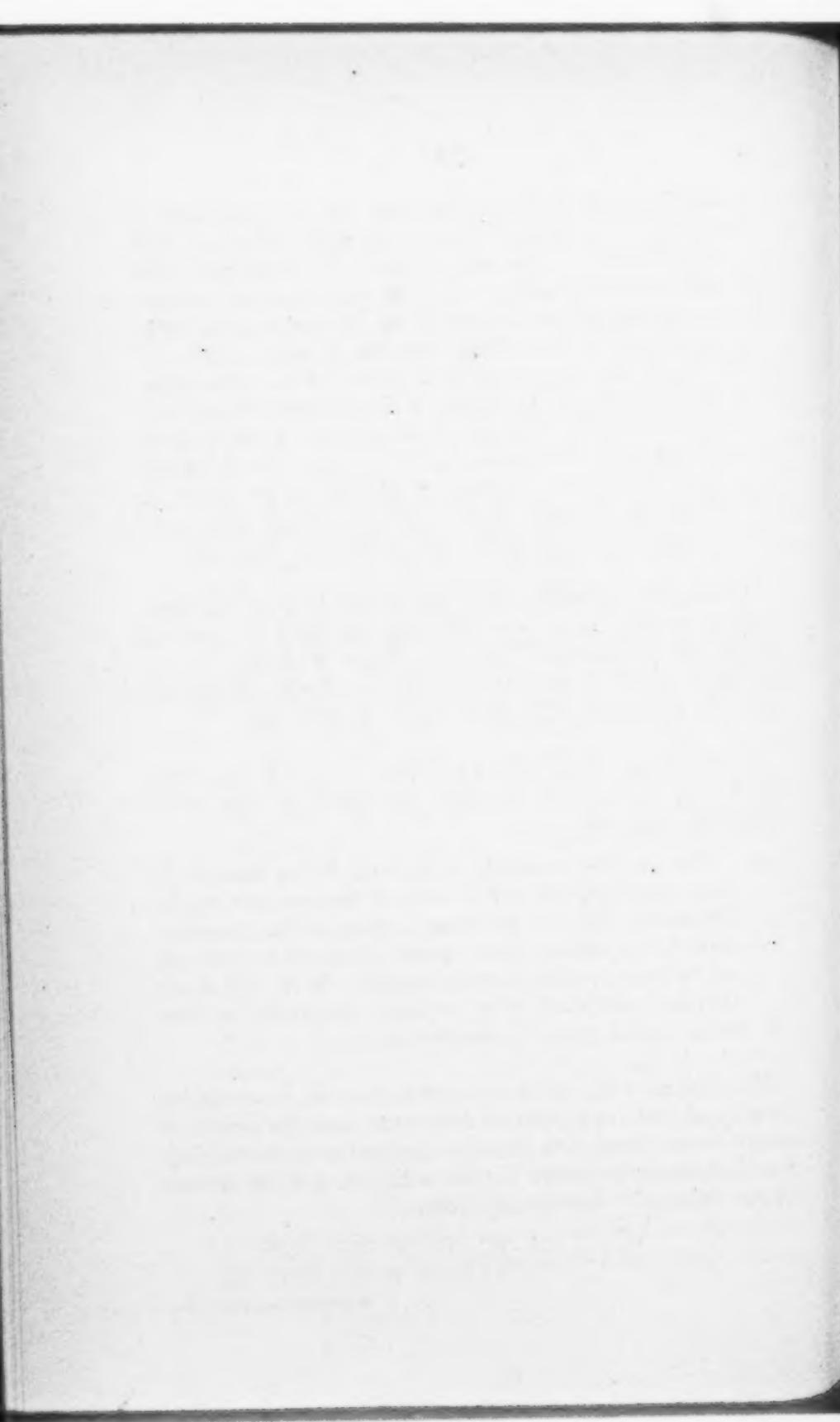
Among the numerous cases where the doctrine has been applied by this Court, the following are cited by way of additional reference: *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 416; *Benziger v. United States*, id. 38, 55; *Eidman v. Martinez*, 184 U. S. 578, 583.

In the recent case of *Gould v. Gould*, 245 U. S. 151, 153, this Court, summing up the cases, expressed the rule in the following language:—

"In the interpretation of statutes laying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. *In case of doubt they are construed most strongly against the government, and in favor of the citizen.*"

We submit, with entire confidence, that the Court below erred, and that the judgment entered against the petitioner should be reversed, and the case remitted with instructions that judgment be entered for the petitioner for the amount of its claim with interest and costs.

A. H. WINTERSTEEN,  
WILLIAM WALLACE, JR.,  
*Attorneys for Petitioner.*



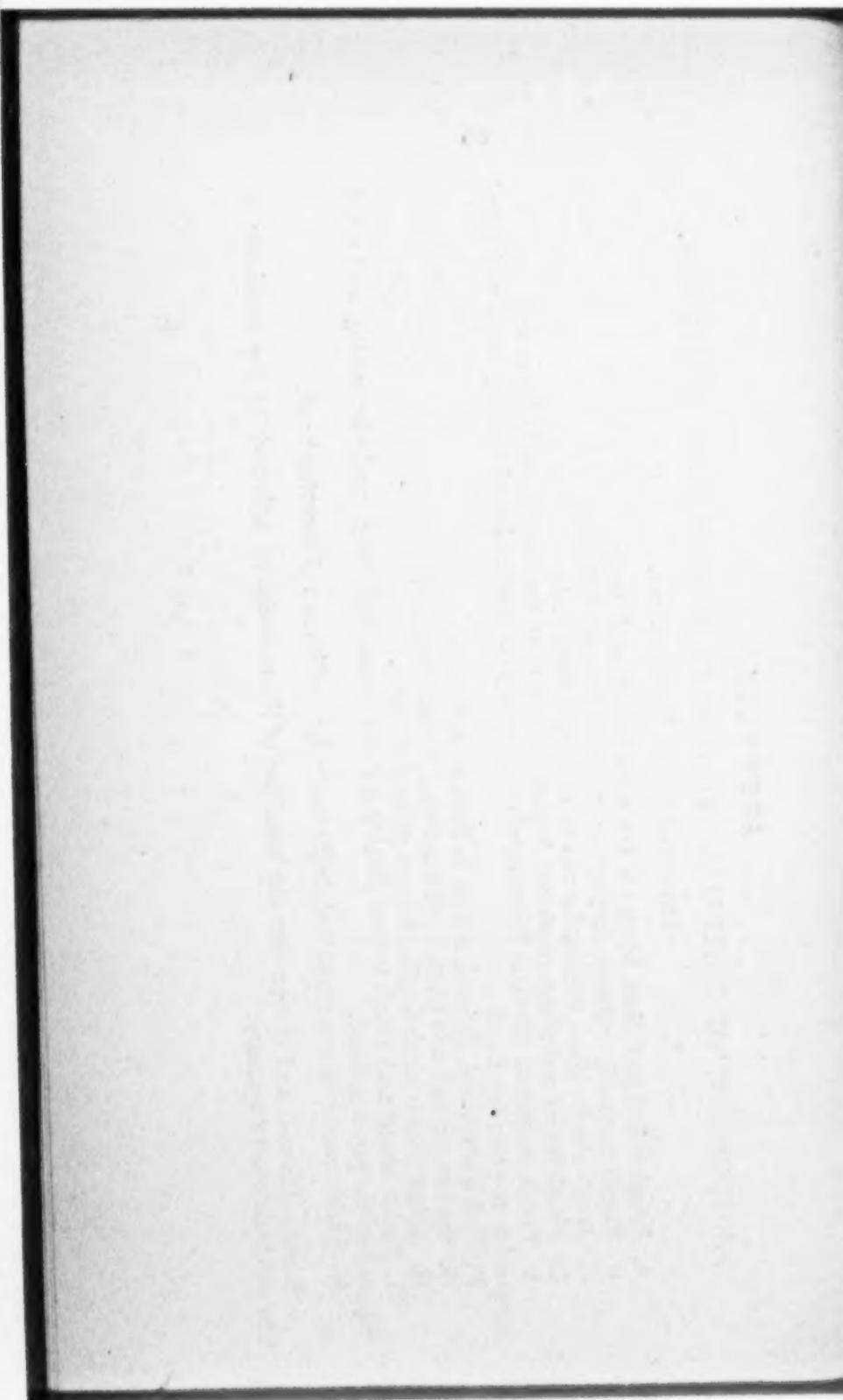
## APPENDIX.

### PHOTOGRAPHS OF MATERIAL OFFERED IN EVIDENCE BY PETITIONER.

#### EXPLANATION OF PHOTOGRAPHS.

- A. Rough rolled and sliced block for 220 m/m French shell body.
- B. Rough punched, undrawn forging for 220 m/m French shell body.
- C. Rough drawn black forging for 280 m/m French shell body.
- D. Finish bored and rough machined forging for 280 m/m shell body, ready for nosing.
- E. Finish machined 280 m/m French shell body ready for application of rotating band, and rolled copper bar for rotating band. 8
- F. Finish machined, banded, 280 m/m French shell body.
- G. Section through 280 m/m finish machined French shell body.
- H. Rough drawn black forging for 293 m/m shell body.
- I. Finish bored and rough turned forging for 293 m/m shell body, ready for nosing, and rolled copper bar for rotating band.
- K. Finish machined 293 m/m shell body ready for application of rotating band.

NOTE.—Items C and H represent the condition of the material as delivered by the petitioner to  
The Midvale Steel Company.



1

2



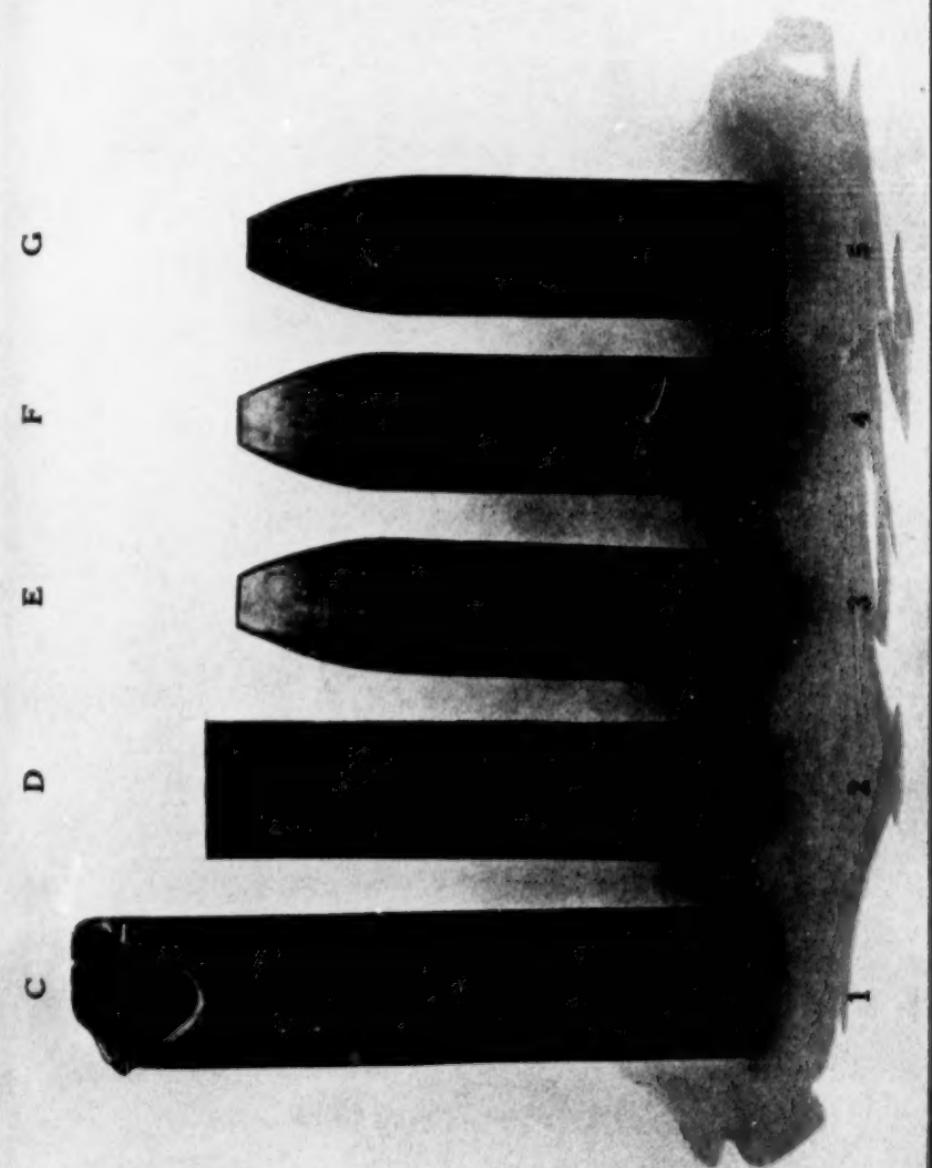
G

F

E

D

C





K

I

H



3

2

1

# In the Supreme Court of the United States.

OCTOBER TERM, 1919.

WORTH BROTHERS COMPANY, PETITIONER,  
v.  
EPHRAIM LEDERER, COLLECTOR, RE-  
spondent. } No. 525.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE THIRD CIRCUIT.

## BRIEF FOR THE RESPONDENT.

This case is here on writ of certiorari to review a judgment of the Circuit Court of Appeals affirming one of the District Court denying petitioner the right to recover \$74,857.07, the amount of taxes paid under protest.

### STATUTE INVOLVED.

The taxes in question were collected under the provisions of section 301 of the act of Congress approved September 8, 1916 (39 Stat., c. 463, p. 781), the pertinent parts of which are:

That every person manufacturing (a) gunpowder \* \* \* ; (b) cartridges, \* \* \* ; (c) projectiles, shells, or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition;

(d) firearms \* \* \* ; (e) electric motor boats, \* \* \* ; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e), shall pay for each taxable year in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: \* \* \*

#### THE FACTS.

The case was tried before the United States District Court at Philadelphia without a jury, and the facts appear concisely in the findings of the district judge as follows:

1. During the taxable year 1916 the Midvale Steel Company was under contract to sell and deliver to the French Government 394,000 high explosive shells of four different sizes to be manufactured according to specifications which were made a part of the contract.

2. The product thus contracted for consisted of two pieces: (1) A shell forged or drawn from steel and finished by the necessary machining and finishing process, and (2) a copper band fitted around the shell for the purpose of guiding it through the rifling of the gun. But the Midvale Steel Company did not undertake to furnish the fuses and explosives which were to be thereafter put in the shells. In other words, the contract called for unloaded shells.

3. It was provided by the contract that the French Government should "have the right of having one or more inspectors at each of the factories where the shells hereby contracted for and their component parts are being manufactured for the purpose of observing the manufacture thereof and of testing the same at any time before delivery."

4. The specifications made a part of the contract include specifications as to the composition and manufacture of the steel to be used, the forging or drawing of the shell from the steel, the machining and finishing of the shell, and the making and fitting of the copper band.

5. In the manufacture of some of the shells the Midvale Steel Company did all the work, beginning with the manufacture of the steel. But as to others it contracted with the plaintiff to furnish the material, manufacture the steel, and forge and draw the shells. This was done according to the specifications above referred to and under inspection of the French Government. When the shells were thus forged and drawn, they were delivered by the plaintiff to the Midvale Steel Company, and that company did all necessary machining and finishing on them and fitted the copper bands around them, and thus further proceeded with and completed the manufacture of the product contracted for.

6. The actual cost of the work done by plaintiff was about 40 per cent of the cost of all the work done on the shells, and the cost of the work done by the Midvale Steel Company was about 60 per cent.

7. The plaintiff's profit, during the taxable year 1916, on the materials furnished and the work done by it as aforesaid was \$598,856.52.

8. The unloaded shell delivered by the Midvale Steel Company to the French Government was the forged or drawn shell delivered to the former by the plaintiff after being subjected to the necessary machining and finishing processes and having a copper band fitted around it.

9. In order to make these forgings, the plaintiff had to provide special machinery at a cost of about \$2,000,000.

10. The forgings themselves as delivered by the plaintiff were specially designed and manufactured to be, when properly machined and finished, used as parts of completed shells. They were not adapted for any other practical use and were not such articles or commodities as are kept in stock and held for sale commercially.

11. During the year 1916 there were a great many companies in the United States engaged in doing some part of the work necessary to the manufacture of shells but not more than two or three, if that many, which began with the steel and did all the work necessary to complete the shell.

12. The plaintiff and the Midvale Steel Company are both owned and controlled by the Midvale Steel and Ordnance Company, a holding corporation.

The facts are therefore substantially these:

The Midvale Steel Company sold to the French Government the unloaded shells in question to be thereafter manufactured. Pursuing a course then in common use, it did not itself do all the work of manufacturing the shells. On the contrary, it contracted with the petitioner to furnish the material and begin and conduct the manufacture up to the stage when only the machining and finishing process remained to be done. It then finished the shells and delivered them to the French Government. The result was that the shells were not wholly manufactured by either company but that the two together manufactured them and as a result of the sale each derived a profit. The tax in this case was laid on the profits which the petitioner derived.

#### QUESTION INVOLVED.

It is not denied that the amount collected was correct if the petitioner is subject to the tax. The sole question is whether the petitioner was during the year 1916 a person manufacturing unloaded shells or any part of such shells within the meaning of the act.

#### THE CONTENTIONS.

The petitioner contends that only a person who turns out complete and ready for use a shell or some definite article which, without more work on it, is ready to be used as a component part of the shell is liable for the tax.

The Government contends that where two persons act together in manufacturing shells or shell bodies, one conducting the manufacture up to a certain stage and the other finishing it, they are both manufacturing the shell and each is liable for a tax on the profits derived by him.

**BRIEF.**

There is no controversy over the amount of the tax if petitioner was subject to it. On the other hand, it is conceded that petitioner has taken all the steps necessary to entitle it to recover if the tax was improperly collected.

**The tax is not one imposed upon specific articles or parts thereof, but is an excise tax imposed on those engaged in manufacturing loaded or unloaded shells or any part of such shells.**

It should be observed at the outset that this is not a tax levied on the articles mentioned in the statute. It is an excise tax levied on persons manufacturing certain articles and is measured by the net profits derived by such persons from the sale or disposition of the articles mentioned. The sole question then is: Whether during the taxable year in question the petitioner was manufacturing, within the meaning of the statute, shells or any part of shells. If so, the tax in question was properly collected, since it distinctly appears that the shell forgings which petitioner produced and delivered to the Midvale Company were used in the manufacture of shell bodies or unloaded shells by manufacturers located within the United States.

The petitioner manufactured the shell body up to a certain stage and another manufacturer then subjected it to the processes necessary to finish it as a shell body. The two together thus manufactured it and both were engaged in its manufacture and both derived a profit from its disposition.

It is to be noted that the contracts in this case were not contracts to sell articles already manufactured and held in stock. They were distinctly manufacturing contracts—that is, contracts to manufacture and sell. One manufacturer contracted with foreign governments to manufacture shell bodies or unloaded shells according to specifications furnished and to deliver them when manufactured. The shell body was a definite article to be produced through the manufacturing processes from steel. The steel used was to be of a specified quality, but it may be assumed that the required quality was not substantially different from that required in other lines of manufacture. Certainly, however, when the work of shaping the steel bars or rounds into the form necessary for shell bodies began, the steel was then devoted to the production of that particular article and the process of manufacture called for by the contracts had commenced. In order to produce a shell body the first step was to pierce or bore the steel round so as to make it a hollow cylinder closed at one end. Next, this cylinder was elongated by a drawing or forging process so as to give it substantially the length required for the shell body. It was thus given roughly the required shape and dimensions of the finished article, except that the shape was after-

wards to be changed to the extent of giving a pointed effect to the open end. The original contractor, not desiring to do this part of the work, or not being equipped to do it, contracted with the petitioner to furnish the steel rounds and conduct the manufacture up to this point, paying therefor a definite part of the price at which it had previously sold the finished shell bodies to be manufactured. The original contractor then took them and, by various machining processes, finished and polished them so that they could be delivered in the form specified by the contract. What the petitioner manufactured and furnished to the original contractor was, therefore, the same thing which the contractor delivered to the foreign governments after having subjected it to certain machining processes. Manifestly, the shell body was not completely manufactured by either of the companies which were engaged in its production. The first stages of the manufacture were just as necessary and just as much a part of the manufacture as the last. Every stage of manufacture was subject to the specifications set out in the contract with the foreign government, and was conducted under the inspection of that government. The shell body was, in fact, partially manufactured by each company—that is, it was manufactured by the two acting together. The profit derived from the sale, made before the manufacture began, was the aggregate amount of profit derived by both. The profit of the company for whom the petitioner partially manufactured these shell bodies was the selling price of

the shell less the cost of manufacture, including what it paid the petitioner for its share of the manufacture. This latter item, of course, included the profit derived by the petitioner, and hence this profit was not included in the profit on which the other company was taxable, and unless taxable to the petitioner escapes taxation altogether.

**The act must be assumed to have been passed in view of the conditions under which munitions were being manufactured in this country.**

It is to be remembered that this act was passed during the period of the European war, *but while this country was still neutral*. At that time, munitions for the use of foreign governments were being produced on a large scale in the United States. The clear purpose of Congress was to impose a tax upon the profits derived from the manufacture of munitions which were sold to foreign governments. This is apparent when it is remembered that upon our entry into the war and a demand being thus created for the production of munitions for our own Government this tax was repealed. (40 Stat., c. 68, pp. 300, 302.) Congress must be assumed to have passed the act in question in contemplation of conditions as they actually existed. The record shows that but few, if any, manufacturers in this country were undertaking to conduct through all its stages the manufacture of shell bodies from steel. On the contrary, the general plan, in effect, was that a company would secure a contract and then arrange, as was done in this case, to have

other companies do that portion of the manufacturing which it was not equipped to do itself. The result was that a certain class of manufacturers did the forging or drawing part of the manufacture, which was done by the petitioner in this case, and the original contractor then did the necessary machining work and thus completed the shell body. In most instances, therefore, the shell body was produced by the combined work of more than one company, each company sharing in the aggregate profits derived from the sale in proportion as it participated in the manufacture. The work done by one was just as essential and just as much a part of the manufacture as that done by the other. If, therefore, it was the purpose of Congress to tax the profits derived from manufacturing munitions for foreign governments, the draftsman of the act must have known that these profits were by no means all derived by the manufacturer who happened to put the finishing touches upon the shell or shell body. If a tax was to be placed only on the profits derived by him, it would be in the power of those contracting to furnish munitions to foreign governments to practically escape taxation. How this could be done is well illustrated by the present case. The petitioner and the Midvale Steel Company were both owned and controlled by the Midvale Ordnance Company. If the petitioner's contention is sound, the latter company could have taken a contract with a foreign government in the name of the Midvale Steel Company and then contracted with petitioner to do not only the work which

that company did do, but to do the greater part of the work and leave only a small part to be done by the Midvale Company and to pay to petitioner the greater part of the price received from the foreign government. There would thus be but little profit to which the tax would apply. Another illustration is presented by a case which is to be heard immediately following this case, in which the corporation taking the contract with the foreign government did none of the manufacturing work itself, but employed various companies to conduct the different stages of manufacture, and now claims that it is not subject to the tax at all. The present contention would further lead to the conclusion that none of the companies participating in the manufacture would be liable except the one which happened to put on the finishing touches.

#### Tax imposed on "every person manufacturing."

Congress must have had in mind the substance of what has just been said when it selected language to describe the persons to whom the tax should apply. The tax was not levied on *shells or parts thereof*, nor on *those who manufacture and sell shells or parts thereof*, but on *every person manufacturing shells or parts of shells and who derives a profit from their sale or disposition*. The language is unusual and significant. The word "manufacturing," as here used, is the participle of the verb "to manufacture," and is defined as "engaged or concerned in manufacture." Murray's New English Dictionary. If the tax had

been levied simply upon those who manufacture and sell shells or parts thereof, it might be said with some force that only those turning out and selling completed shells or completed parts of shells would be liable for the tax. It might then be said that one who sold an article which had been subjected to only a portion of the processes necessary to produce a shell body did not sell a shell body, since none had been produced. If we were dealing with a tax specifically levied not upon the profits of a manufacturer but upon such articles as shells or parts thereof, as is the case with tariff acts, it might be said with reason that the forgings turned out by the petitioner were neither shells nor completed parts of shells. But a tax is laid on every person engaged or concerned in manufacturing shells or shell bodies. Those conducting the first stages of manufacture are just as much engaged in the manufacture of the finished article as those conducting the last stages. The manufacturer of a rough shell forging which finally becomes a shell body is as much engaged in the manufacture of that shell body as those who do the necessary machining and finishing. It may be true that the petitioner did not itself sell either shells or completed parts of shells, but it is to be noted that the net profits by which the tax is to be measured are not limited to profits realized through a sale by the person taxed of the articles mentioned in the statute. Rather they are the profits derived by him from any sale or disposition of such articles in the manufacture of which he has been engaged as a result of

which profits come to him. In this case there was a sale of shells to be thereafter manufactured according to contract. The petitioner participated with the original contractor in the manufacturing required by the contract and shared with the original contractor the contract price. As a result of this sale and disposition of shell bodies to foreign Governments the petitioner manufactured them up to a certain stage, and the original company completed the manufacture. The profit which the petitioner derived was thus derived from the sale made to the foreign Government. Both petitioner and the original contractor were engaged in the manufacture, and each derived from the same source a profit from the disposition of the manufactured article. The language used in the act is susceptible of no other construction than that each must pay a tax measured by its share of the profits.

**Cases cited by counsel and arising under other laws  
not applicable.**

The cases dealing with articles, or parts thereof, under tariff laws are wholly inapplicable. Such laws levy taxes upon specific articles, upon materials in various stages of development, upon finished articles, and upon component parts of such articles. The question therefore is, whether a particular article is one of the articles specified in the law as subject to tax or only something which by further manufacture can be converted into such an article. It is usually whether a particular article is to be taxed as

a material which may be used for specific purposes, whether it is a finished manufactured article, or whether it is a component part of such article. Here, however, Congress has departed from the language so used in levying tariff taxes and, instead, has levied a tax upon persons in language which, as we have shown, means persons engaged in manufacturing. The tax is not laid on the article itself, nor is it laid upon the manufacturer who turns it out complete, but upon every person engaged in its manufacture and making a profit from its disposition. It may be said that a rough steel forging is not a component part of a finished shell until it has been machined and finished and that it would not be subject to a tariff tax on shells, or parts thereof. But when it is finished it is a part of a shell and every person who has done any part of the work necessary to produce and finish it has been engaged in its manufacture. One begins the work and partially manufactures it. The other takes it at this stage and completes the manufacture. It has then been completely manufactured by being partially manufactured by each of the companies engaged in its manufacture.

The cases of *Burdon Central Sugar Refining Co. v. Payne*, 167 U. S. 127; *Allen v. Smith*, 173 U. S. 389, and *Tidewater Oil Co. v. United States*, 171 U. S. 210, cited by counsel, are no more applicable than the tariff cases. The first two cases dealt with the act granting a bounty to the producers of sugar. The court simply held that the raiser of the cane was not the producer of the sugar. He produced the

cane and, from the cane, the refiner produced the sugar. The third case dealt with the right to a drawback, under the tariff laws, on account of box shooks claimed to have been manufactured *wholly within the United States* from materials brought into this country upon which the duty had been paid. The court found that the alleged materials had been imported not merely as materials, but in the shape of partially manufactured box shooks, and hence held that the box shooks as afterwards exported could not have been *wholly manufactured* within the United States. If this case has any bearing on the present case it is decidedly in favor of the Government. It clearly recognizes that there is such a thing as a partial manufacture. After one has manufactured an article which, without more, is suitable for use as a component part of some other article, there has been a complete manufacture. If, however, an article has been produced by the combined work of two persons, neither can be said to have completely manufactured it, but it has been produced by the partial manufacture of each. If there is such a thing as a partial manufacture of an article, then one who is engaged in its partial manufacture is necessarily one of the persons engaged in its manufacture. This brings the petitioner clearly within the act under consideration.

**CONCLUSION.**

It is respectfully submitted that there is no error in the judgment of the Circuit Court of Appeals and it should be affirmed.

Respectfully,

WILLIAM L. FRIERSON,  
*Assistant Attorney General.*

DECEMBER, 1919.



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IN THE  
**Supreme Court of the United States**

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No.

OCTOBER TERM, 1919

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**FORGED STEEL WHEEL COMPANY, Petitioner,**

vs.

**C. G. LEWELLYN, Collector of Internal Revenue for the  
Twenty-third District of Pennsylvania, Respondent.**

**WORTH BROTHERS COMPANY, Petitioner,**

vs.

**EPHRAIM LEDERER, Collector of Internal Revenue for the  
First District of Pennsylvania, Respondent.**

---

**BRIEF FOR THE DAYTON BRASS CASTINGS  
COMPANY, OF DAYTON, OHIO, interested in  
questions involved, and permitted by the court to  
present issues involved in cases similar to those in-  
volved in the above cases, asking for allowance of  
Certiorari.**

**STATEMENT OF CASE OF THE DAYTON BRASS  
CASTINGS COMPANY AND ITS PRESENT  
STATUS.**

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The Dayton Brass Castings Company is a manufacturing corporation, located in Dayton, Ohio, engaged in the manufacture and sale of castings made out of its own material. The Recording & Computing Machines Company is also a corporation located in Dayton, Ohio,

becoming extensively engaged in the manufacture of time fuses for shells manufactured, under contract with the Canadian Car & Foundry Company, for the Russian Government.

These companies will hereafter be called the Castings Company and the Recording Company.

There is and was no connection in any way between the two companies, no unity of interest, or control, or management, each being entirely independent of the other, except as bound up by contracts under which the Castings Company agreed to mould the material furnished and owned by the Recording Company into certain rough preliminary forms in which they were delivered back to the Recording Company. This material was brass, copper and aluminum ingots, all furnished by the Recording Company.

The time fuses, when the parts are all finished and assembled, consist of forty-five different, complete parts. The Castings Company furnished the castings out of which four of these parts were made. They were in the rough, in no way fitted in their shape or size for use in the fuse; and were each subjected to cutting and other various manufacturing operations by the Recording Company, amounting to 18, 23, 28 and 29 separate handlings before fit to be assembled. Nor were the articles fit for use in their shape in any commercial way, being designed specifically for the use intended. Payment was made by the pound.

If a completed fuse is taken apart, no one unfamiliar with the facts could recognize any one of the finished

parts as being one of the four rough parts furnished by the Castings Company.

The Castings Company made no report of its earnings, and was cited by the Commissioner of Internal Revenue. A hearing was demanded, pending which a return was made by agreement without prejudice and under protest. The Commisisoner ruled that the return should be made and attached a penalty of fifty per cent, as required by law. The return made was Eighteen Thousand Eight Hundred and Sixty and 83/100 (\$18,860.83) Dollars. The total was Twenty-eight Thousand Two Hundred and Ninety-one and 25/100 (\$28,291.25) Dollars. This was paid under protest, demand for refunder made within time, and a refusal as to the principal, but allowed as to the penalty, leaving due to the Castings Company, if its contention is correct, the sum of Eighteen Thousand Eight Hundred and Sixty and 83/100 (\$18,860.83) Dollars, the original assessment with interest from the date of payment.

Suit was brought for the above amount and was submitted to Judge Sater in May, 1918. The testimony and oral argument being heard, it was agreed that no further action should be taken, in view of the pendency of the suits now on hearing in the District Court of the United States for the Eastern and Western Districts of Pennsylvania.

This statement is made to show that our client (as well as two other concerns in our city) is directly interested in the questions involved in the cases under consideration.

In addition to the points made by counsel for petitioners, our case presents one additional vital objection to the course of the Commissioner of Internal Revenue, which objection exists in other cases not now before the court, viz:

The Castings Company cannot be classed as a manufacturer in this matter, within the view of the law, as the statute only reaches such persons as "sell or dispose" of the alleged parts, which qualification necessarily implies that the law is intended to cover only such manufacturers engaged in making munitions as make gains from the sale of their own material, and not such as merely furnish labor to others.

#### POINTS OF LAW

We will not attempt any additional argument upon the points so ably presented by counsel for the petitioners, and so well buttressed by authority.

#### I

The Court of Appeals ignored the vital rule of decisions laid down by this court in the case of Gould vs. Gould, 245 U. S., 151, to which we refer only for the purpose of saying that the statute under consideration in that case, after reciting almost every conceivable source of income, added a sweeping clause intended to cover "income from any source whatever." Yet this court, by a unanimous vote, exempted alimony upon the principle that the doubt should be resolved for the citizens. This application of the rule gives it life and

vitality, and indicates that the court will not permit it to be frittered away by fanciful presumptions, or excursions into the fields of uncontrolled imagination.

## II

The Court of Appeals seemed to consider there was ambiguity in the words of the law. Hence, it branched off into the politics of the day, and drew certain conclusions as to the mind of Congress, deriving therefrom a certain alleged intent, not in harmony with the words. In other words, the ambiguity was removed by this excursion into the field of supposed general knowledge.

There are not many authorized ways of ascertaining the mind of Congress, outside of the language used in its laws. Reference to the debates has long since been discarded, and the recent and continuing discussion as to the treaty is a solemn reminder of the wisdom of the ruling. In a recent case in this court Mr. Justice Pitney said :

“It is not our purpose to relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment. *United States v. Trans-Missouri Freight Assn.*, 166 U. S., 290, 318. But the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications. *Blake vs. National Banks*, 23 Wall,

307, 317; Holy Trinity Church vs. United States, 143 U. S., 457, 464; Dunlap vs. United States, 173 U. S., 65, 75; Binns vs. United States, 194 U. S., 486, 495; Johnson vs. Southern Pacific Co., 196 U. S., 1, 20; Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S., 184, 198; Five Per Cent Discount Cases, 243 U. S., 97, 107. The remarks of Mr. Lacey, and the amendment offered by him, in response to an objection urged by another member during the debate, were in the nature of a supplementary report of the committee; and as they related to matters of common knowledge they may very properly be taken into consideration as throwing light upon the meaning of the proviso; not for the purpose of construing it contrary to its plain terms, but in order to remove any ambiguity by pointing the subject-matter of the amendment. This is but an application of the doctrine of the old law, the mischief, and the remedy."

*U. S. vs. R. R. Co.*, 247 U. S., 318.

In another case in this court counsel for the plaintiff, in order to avoid the reference to be drawn by the omission of a certain clause in a proposed law, was arguing that Section 8 provided for the same as a consolidation, and to show that his contention was right, referred to the statement of Senator Cullom, a member of the conference committee, but not its chairman. Mr. Justice Lamar brushed the same aside in the following language:

"The fact that this provision measuring the amount of recovery by rebate was omitted from the

Act, as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement, made by a member of the Senate Conference Committee, to support the present argument that Section 8 means the same thing as the omitted clause. But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a Committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different."

*Penn. R. R. Co. vs. Coal Co.*, 230 U. S., 198, 199.  
See also in this connection :

*Caminetti vs. U. S.*, 242 U. S., 471, 490.

We cite these cases as evidence of the control this court maintains over improper search for reasons of legislative action. It is only in cases of doubt, as to meaning of words or phrases, that the mind of Congress may be investigated by other methods, and then in only authorized ways. One of the most uncertain ways was that adopted by the Court of Appeals in this case, being subject to no check and giving rise to new issues, not capable of settlement.

One would imagine that the ordinary way to ascertain what "parts" entered into the make up of a machine, a gun, a shell or other complex article, would be to take apart a finished specimen. Who built the part or parts

under consideration would be the next inquiry. If more than one person was engaged in successive work upon the part, from the beginning of its manipulation to the time it was finished and placed in position, who has constructed the part? The numerous cases cited in briefs for the petitioners herein answer the question. If Congress knew, as the Court of Appeals asserts, of all the varying operations by different persons or corporations in the preparation of a single part, it is singular that it did not use words to express its intent as claimed. In many ways the intent could have been clearly and tersely expressed.

When we recur to the rule laid down in the Gould case heretofore cited, and particularly to its application in that case, we cannot escape the statements that the Court of Appeals utterly ignored its doctrine.

But this phase of the case has been so exhaustively and ably argued by other counsel that we refrain from further comment.

#### THE CASTINGS COMPANY NOT A MANUFACTURER WITHIN THE MEANING OF THE STATUTE

We come now to the proposition already stated as being peculiar to the case of The Brass Castings Company and some others in Ohio and elsewhere, viz: that one who only bestows labor upon materials in which he has no interest is not a manufacturer "who sells or disposes of" the same, or "derives profits from such sale or disposal."

The presence of this question in so many cases, which are pending in court or before the Commissioner of Internal Revenue, furnishes a cogent argument for the allowance of the writ in this case, so that the court in a comprehensive view of the whole statute may cover cases that will not be decided by a refusal of the certiorari, and must therefore proceed to trial in the courts below.

We maintain that the law necessarily implies that the articles from the sale or disposal of which the profits arise must be the property of the person to be charged. He must have some title thereto which he can "sell or dispose of" at a profit. Obviously since title to the castings remained with the Recording Company at all times and at every stage as the work progressed until delivery by those companies to The Canadian Car & Foundry Company, and inasmuch as the Brass Company never had sole, or even qualified, title thereto at any time or at any stage of the work and was rewarded solely by the Recording Company at a specified rate per pound, it cannot be said, even under tortured construction, that any net profits were received by or accrued to the Brass Company from "the sale or disposal of" any of the articles specified in Section 301 of the Act.

#### MEANING OF WORDS "SOLD OR DISPOSED OF"

The meaning of the words "sold or disposed of," as used in this law, must be considered in the light of the decision of this court, if they need any elucidation. Another rule of construction here comes into play. When two or more words are used together, one of which is apparently broader or more comprehensive than the

others, and is not in itself of definite meaning, the universal rule in the construction of contracts, wills, statutes, etc., is found in the ancient maxim "noscitur a sociis." This rule is stated as follows:

"By the rule of construction known as *cujusdem generis*, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated."

36 Cyc., page 1119.

We cite this because it has been approved by federal decisions.

See: *Bank vs. U. S.* 205 Fed., 374, 379.

We call attention to the following language of Mr. Justice Brown. We quote:

"The clause in the tariff act covering these manufacturers imposed both a specific and an ad valorem duty upon 'woolen cloths, woolen shaws, and all manufactures of wool of every description.' Applying the rule of *noscitur a sociis*, it can hardly be supposed that wool, used for the purpose of waste and as an adulterant in the manufacture of cloths, was to be included in the same designation as woolen cloths and shawls, which evidently refers to articles made of wool and having a separate designation of their own."

*Patton vs. U. S.*, 159 U. S., 500, 509.

Applying this rule, while it is true that the word "sell" has a definite meaning of disposal for money, whether on time or for cash, the words "disposed of" mean something more, but something more of a similar character, viz: a disposal by way of barter, exchange or otherwise; all, however, implying ownership of the material. The legislators added the more general word to prevent possible evasions of the law by some contrivance to get rid of the property by exchange, or barter, or some one of the ingenious plans that are always brought out to escape taxation. It was a net, as it were, to prevent an actual sale from being disguised under transactions so as to appear in law not be a sale.

But we are hardly left to the inference or argument, Section 303 practically stamps the meaning of both words "sell" and "dispose.". It uses the word "dispose" as practically the synonym of "sell." No one is permitted to "dispose" of the property at less than the fair market price; and this section of the statute shows conclusively that the law contemplated that the person was the owner of the materials.

Furthermore, the proviso attached to Section 301 of the statute reads as follows:

"That no person shall pay such tax upon the net profits received during the year 1916 derived from the *sale and delivery* of the articles named, etc."

Here is found no word of "disposition," and unless the word is used in the statute generally, as in some sort of an expanded synonym of sale, if we may use the language, the legislature was guilty of a great lapse, which we cannot impute to it.

There are numerous cases in the Supreme Court of the United States, discussing or deciding the meaning of the word "disposition," when used as in our case.

*Platt vs. Union Pac. Ry.*, 99 U. S., 48, 61, 62.

*Phelps vs. Harris*, 101 U. S., 370, 380, et seq.

*Hall vs. Sumner*, 132 U. S., 118.

In the Platt case, *supra*, the Supreme Court, by a divided court, held that a mortgage was, under the circumstances of that case, a "disposition" of lands. The dissenting judges were Miller, Bradly and Clifford. We quote the second section of the syllabus:

"2.—That the words "or disposed of" are not redundant, nor are they synonymous with "sold," but they contemplate a use of the lands granted different from the sale of them, and that a mortgage of them is such a use."

Intimation was made in majority opinion that a mortgage at common law was a conditional sale, but not as the basis of the opinion.

In Phelps vs. Harris, *supra*, the question involved was as to whether one given power under one will, to "sell and exchange" property, had power to co-operate

with one given power under another to "dispose" of the same property to partition said property; the court held that it did. After citing numerous English authorities as to the construction to be placed upon these terms, the court says, on page 381:

"2.—As a corollary to, or part of, the last proposition—technical words and expressions must be taken in their technical sense, unless a clear intention can be collected to use them in another sense, and that others can be ascertained. Hawkins Construction of Wills, pp. 2, 4.

Now, whilst it may be true that when the words "disposed of" are used in connection with the word "sell," in the phrase "to sell and dispose of," they may often be construed to mean a disposal by sale; it does not necessarily follow that when power is given generally, and without qualification by associated words, to dispose of property, leaving the mode of disposition to the discretion of the agent, that the power should not extend to a disposal by barter or exchange, as well as to a disposal by sale. The word is nomen generalissimum, and standing by itself, without qualification, has no technical signification. Taking the whole clause in the codicil together, it is equivalent to an authority to dispose of the property as the trustee should deem most for the interest of his children; and this would include the power to barter or exchange as well as the power to sell."

In the case of Hall vs. Sumner, *supra*, Miller speaking for the whole court, held that a lease of lands was within a clause prohibiting a disposition of same. We quote the first paragraph of the syllabus:

"When a contract respecting property contains an agreement to be performed by the owner of it when he shall "dispose of or sell it," it is obvious that the words "dispose of" are not synonymous with the word "sell;" and their meaning must be determined by considering the remainder of the contract."

Also the language of the court, on page 123:

"The definition of the words "dispose of" or "sell," in this article, must be considered with reference to the remainder of the contract, to ascertain its meaning. Obviously the word "dispose" must have some meaning in the contract, and is not synonymous with the word "sell." It would be useless, if such were its construction. It must mean something more or something less than the word "sell." In the circumstances of this case, it would seem to mean something more."

Bouvier's Law Dictionary contains the following:  
"DISPOSE—To alienate or direct the ownership of property, as disposition by will." The Century Dictionary defines the word "disposition" in part as follows:  
"DISPOSITION—Plan or arrangement for the disposal, distribution or alienation of something; definite settlement with regard to some matter; ultimate destin-

ation, as ‘he has made a good disposition of his property,’ ‘what disposition do you intend to make of this picture.’” And it defines the verb “dispose” in part as follows: “To make over or part with, as by gift, sale or other means of alienation; alienate or bestow; as ‘he disposed all church preferments to the highest bidder.’”

In 5 Am. & Eng. Enc. Law—703, it is said of the word “dispose” that “if not always anonymous with, it is akin to the word ‘sell.’”

In *U. S. vs. Williams*, 18 Fed., 475, the court said at p. 477:

“The proviso does not license the cutting of timber for the purpose or with the intention of disposing of the same. Whatever timber it is necessary to cut to prepare the land for tillage, the settler ought to be allowed to dispose of to the best advantage to himself—to sell it rather than destroy it.”

On the construction of this same act, see a similar holding in

*U. S. vs. Hacker*, 73 Fed., 292.

In *Love vs. Pamplin*, 21 Fed., 755, certain lands protected by treaty had been sold at the instance of a creditor of the Indian owner. The heirs at law of the Indian claimed that the purchaser at the sheriff’s sale could not obtain title because of the United States treaty providing that reservations of Indian lands of individuals should not be “sold, leased or disposed of” except in the

particular manner pointed out by the treaty. In holding that the statute did not apply to a creditor's sale, the court said, at p. 760, of the words quoted that :

"It becomes a question, therefore, in the first instance, of the true meaning of the treaty, and looking at its provisions in the light of the circumstances, and of the natural and obvious meaning of the language in which they are expressed, and of the context, it appears to be clear that the intention of the instrument limits the clauses restrictive of alienation, as to the lands reserved to individuals, to cases of voluntary conveyances. The language of the prohibition is that the reservations shall be not 'sold, leased, or disposed of,' and although the words last used 'disposed of' might seem to embrace other dispositions than those of sale and lease, yet they cannot, upon the principle *Noscitur a sociis*, be extended so as to include any other than those of a character like those specifically named; that is, of a voluntary nature, effected by the personal will of the possessor."

In *Woodbridge vs. Jones*, 183 Mass., 549, the court construed a clause in a will wherein the testator provided :

"I devise and bequeath all the rest and residue of my estate, both real and personal, to my wife, Serepta Twise, during her life, to use and dispose of the same as she may think proper with remainder thereof on her decease" to certain classes of persons.

The court held :

"The word 'dispose' includes a disposition by a conveyance absolute and in fee simple, and that therefore the life tenant had the power during her life to make such a conveyance of a part or the whole of the property."

In *Bullens vs. Smith*, 75 Mo., 151, the court said of an attachment suit :

"The word 'dispose' \* \* \* was, we think, intended to cover and does cover all such alienations of property as may be made in ways not otherwise pointed out in the statute; for example, such as pledges, gifts, pawns, bailments, and other transfers and alienations as may be effected by mere delivery and without the use of any writing, assignment or conveyance."

These definitions and practically all of the others we have examined attribute to the word "dispose," a meaning having to do with change in the ownership or title, by sale or similar act. The Commissioner of Internal Revenue, in his Regulations, seems to regard the terms as interchangeable.

Of course the words "dispose of" may be used in a great many various senses. Thus a thief may "dispose of" stolen property. The words imply that he has feloniously exercised the right of ownership. So in the case of a clerk embezzling the property of his principal, etc. But the words must always be construed in the

particular case according to the matter involved and the language used.

As we maintain that when used as affecting lawful transactions, the use necessarily implies, especially in the case at hand, ownership of some nature, and a disposition of the title, involving the receipt of money or its equivalent for something more than mere labor bestowed upon other person's property.

We refer, in conclusion, to the record showing that an important section in the proposed law was stricken out, viz: Section 2, with no substitute therefor.

We refrain from argument upon the same because the whole matter is fully discussed, and the section cited, in the brief of counsel for the Forged Steel Wheel Company on pages 36, 37 et seq.

We respectfully submit that in the interest of all parties certiorari should issue to enable this court by one decision to close out pending controversies and dispose of all litigation under this law.

J. SPRIGG McMAHON,  
Attorney for The Dayton Brass  
Castings Company.

IN THE  
**Supreme Court of the United States**

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No.

OCTOBER TERM, 1919

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**FORGED STEEL WHEEL COMPANY, Petitioner,**

vs.

**C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Respondent.**

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**WORTH BROTHERS COMPANY, Petitioner,**

vs.

**EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania, Respondent.**

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**PETITION OF THE DAYTON BRASS CASTINGS COMPANY, OF DAYTON, OHIO, FOR LEAVE TO FILE BRIEF IN THE ABOVE ENTITLED CASES.**

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Your petitioner, The Dayton Brass Castings Company, a corporation organized under the laws of Ohio and engaged in the business of manufacturing brass and aluminum castings in the city of Dayton, in said state, respectfully represents to your honors that it is interested in the settlement of the questions of law involved in the above named suits, and therefore prays that it may be allowed to appear and file a printed brief in aid of the petition for certiorari. A copy of this brief was fur-

nished counsel for the Government on or before September 25th. Its reasons for this application are as follows:

The question involved is the proper construction of Section 301 of the Act known as the "Munitions Act" and the main contention is over the meaning of the word "part" in said section, so as to determine who is a "manufacturer of a part of a shell or fuse," or other named article, the petitioners contending that the statute means a finished part and not a rough casting.

This petitioner is interested in the solution of this question, having a suit pending in the District Court of the United States for the Southern District of Ohio, seeking to recover the sum of about eighteen thousand (\$18,000) dollars, exacted from it contrary to law, as it claims, in which the testimony has all been submitted to the court without any conflict, but in which decision is withheld, pending the hearing of the cases now in hand.

Your petitioner would not ask for this privilege if its case depended solely upon the points made in the briefs already filed in these suits, the same being thorough and convincing. But the controversy growing out of the proper construction of Section 301 is much wider, and there are questions, not involved in the above pending suits, that will not be settled by the refusal of a certiorari. For example, in the suit of this petitioner against the Government, it is an admitted fact that no part of the material belonged to this petitioner, but was furnished by the original contractor, this petitioner performing only labor, paid for by the pound for rough castings, and having no right, title or interest at any time to the material so worked up. There are two other

similar claims in Ohio, one in suit and one pending before the Commissioner. And your petitioner is informed that throughout the country there are manufacturing establishments having suits or pending claims wherein the same question is involved.

It is respectfully represented to the court that in the consideration of the proper scope of Section 301, the main contention is, who is a "manufacturer" within the meaning of the section? All are manufacturers in the ordinary sense of the term.

If the writ of certiorari is granted, it seems to the counsel for The Dayton Brass Castings Company that an interpretation of the word "manufacturer," who "sells or disposes of" the material, is so involved with the settlement of the questions presented by the petitioners herein, as to make the path easy for the court to settle all the pending cases and controversies growing out of the law, so far as now known. It is for this reason that we pray the privilege asked for in the interest of speedy justice; otherwise the litigation must go forward.

A fuller statement of the case of this petitioner is made in the opening of the brief; and to all the statements of fact therein or herein made, counsel, whose name is hereto attached, certifies they are true and that the petition is well founded, both in law and in fact.

THE DAYTON BRASS CASTINGS COMPANY,

By.....

J. SPRIGG MCMAHON,  
For Petitioner.

**CERTIFICATE**

I certify that I am attorney for and counsel for the petitioner herein; that the allegations contained in said petition are true, and that said petition is, in my opinion, well founded in point of fact as well as law.

.....  
**Attorney for Petitioner.**

IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1919.

**WORTH BROTHERS COMPANY,**

*Petitioners*

vs.

**EPHRAIM LEDERER, Collector of  
Internal Revenue for the First  
District of Pennsylvania,**

No. 525

**PETITION OF CURTIS AND COMPANY MANU-  
FACTURING COMPANY AND SUGGESTIONS  
IN CONNECTION WITH ABOVE CASE.**

E. G. CURTIS,

Security Building, St. Louis Mo.

MAGA & KIRBY,

Security Building, St. Louis

Attorneys for Petitioners

Re: Louis May Company Co., Plaintiff vs. Ephraim R. Lederer, et al.

IN THE  
**SUPREME COURT OF THE UNITED STATES.**

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OCTOBER TERM, 1919.

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WORTH BROTHERS COMPANY,  
*Petitioner,*

vs.

EPHRAIM LEDERER, Collector of  
Internal Revenue for the First  
District of Pennsylvania,

*Respondent.*

} No. 525.

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**PETITION OF CURTIS AND COMPANY MANU-  
FACTURING COMPANY AND SUGGESTIONS  
IN CONNECTION WITH ABOVE CASE.**

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*To the Honorable the Justices of the Supreme Court  
of the United States:*

Your petitioner respectfully shows:

That in the above-entitled cause the question involved is the construction of Section 301, Title III, of the Act of Congress of September 8th, 1916, generally known as the Munitions Manufacturers' Tax. The particular question involved was whether or not a

rough steel forging intended for use as a part of a shell was a part of a munition within the meaning of that act. The steel forging in question was not a finished product, as many more operations were necessary before the forging could be used as a part of a shell.

This exact question is involved in a claim for refund made by your petitioner herein to the Honorable George H. Moore, Collector of Internal Revenue for the Eastern District of Missouri. This claim is now pending before the Internal Revenue Commissioner in Washington and has not as yet been passed upon. The claim is for a refund of two hundred sixty thousand eight hundred sixty and 79/100 dollars (\$260,860.79), paid for the year 1916. In addition to this pending claim your petitioner also expects to file a claim for the refund of one hundred fifty-two thousand four hundred seventy-three and 06/100 dollars (\$152,473.06) against the same Collector for Munitions Manufacturers' Tax paid for the year 1917. In both of these claims exactly the same question is involved as is involved in the case presented to your Honors by C. Worth Brothers Company above entitled.

Your petitioner is engaged in business in the City of St. Louis, Missouri. It contracted with various other concerns who were themselves engaged in furnishing shells for foreign governments, to do certain work for these concerns. Your petitioner received

steel billets which it in turn made into rough forgings. Your petitioner had no contracts to furnish shells, and the work done by it in no sense completed a part of a shell. After the rough forgings were made by it, it was necessary for the parties with whom it had contracted to do a great deal of additional work in order to make the rough forging a completed part.

In the event that your petitioner herein is denied a refund by the Commissioner of Internal Revenue it will be obliged to file suit against the Collector in the United States District Court for the Eastern District of Missouri, which is in the Eighth Judicial Circuit. It is our understanding that there are other claims of considerable amount pending in other circuits, on some of which suit has already been filed and on others of which suit will be filed in the near future. It is, therefore, apparent that not only large sums of money are involved, but the case is one of public importance because it involves the construction and operation of a revenue act under which large sums have been collected by the United States, and which has never been passed upon by this Court. If the matter can be considered now by your Honors it is apparent that at least there will be a great saving of litigation upon the particular point involved in the suit above entitled.

Wherefore, the foregoing matters being considered, your petitioner respectfully prays that the Court will

grant the prayer of the C. Worth Brothers Company for the writ of *certiorari* to the United States Court of Appeals for the Third Circuit, and thereby avoid to your petitioner and many others, as well as to the Government, a great weight and burden of litigation.

CURTIS & COMPANY MANUFACTURING COMPANY,

By C. W. FREES,

*Secretary Treasurer.*

E. G. CURTIS,

NAGEL & KIRBY,

*Attorneys for Petitioner.*

I certify that I am attorney for and of counsel for the petitioner herein; that the allegations contained in said petition are true, and that said petition is, in my opinion, well founded in point of fact as well as law.

*E. G. Curtis'*

*Attorney for Petitioner.*

## Opinion of the Court.

WORTH BROTHERS COMPANY *v.* LEDERER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

## CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 525. Argued January 8, 9, 1920.—Decided March 1, 1920.

Rough shell forgings, sold by their manufacturer to another having a contract to deliver completed shells to the French Government, are "parts" of shells, within the meaning of the Munitions Tax Act of September 8, 1916, c. 463, § 301, 30 Stat. 780, the profits from which are taxable under the act to the manufacturer of the forgings. P. 509.

258 Fed. Rep. 533, affirmed.

THE case is stated in the opinion.

*Mr. A. H. Wintersteen*, ~~and~~ whom *Mr. William Wallace, Jr.*, was ~~on~~ the brief, for petitioner.

*Mr. Assistant Attorney General Frierson* for respondent.

*Mr. E. G. Curtis*, by leave of court, filed a brief as *amicus curiae*.

*Mr. J. Sprigg McMahon*, by leave of court, filed a brief as *amicus curiae*.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ is directed to the judgment of the Circuit Court of Appeals affirming a judgment of the District Court for Lederer, to whom we shall refer as the Collector,

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in an action by petitioner to recover from him the sum of \$74,857.07 exacted as a tax under § 301 of the Munitions Manufactures Tax Act of September 8, 1916, 39 Stat. 780, and paid by petitioner under protest.

A detail of the imposition of the tax and the protest of its payment are unnecessary to give. The other facts were stipulated and it appears from the stipulation that during the taxable year 1916 petitioner made the steel for and did the forging on certain shell bodies under an order from the Midvale Steel Company, to enable the latter company to carry out a contract which it had with the Government of France for certain explosive shells. The steel was made and the forging done by petitioner in accordance with specifications required by the French Government, which specifications were attached to the order from the Midvale Steel Company to petitioner.

Inspectors employed by the French Government inspected the work done by petitioner, testing the steel and examining the forgings as they passed through petitioner's hands. "Up to the time when the blooms of steel were sliced partly through into billets, the right of inspection was exercised by the French Inspector-in-Chief, only whenever he desired to exercise it." Some forgings were rejected and those that were passed were so marked by the inspector. This was done in accordance with an understanding between petitioner and the Midvale Steel Company.

The profits, upon which the tax as claimed in this case was imposed, were derived solely from the sale of the above mentioned forgings.

The Munitions Tax Act provides (§ 301, c. 463, 39 Stat. 781) "that every person manufacturing" certain articles and "shells" "or any part of the articles mentioned . . . shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net

507.

Opinion of the Court.

profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

The question is the simple and direct one whether a shell forging under the stipulation and evidence is "any part" of a shell within the meaning of the law. The argument of petitioner, in support of a negative answer, is very diffuse, pressing considerations which we do not think are relevant.

A shell is a definite article, constituted of materials of a certain kind and quality, assembled and fitted and finished so as to be adequate for its destructive purposes. Is not every element (we use the word for want of a better) in the aggregation or composition or amalgamation (whichever it is), of a shell, a part of it? If not, what is it? And what is the test to distinguish a part from not a part? We use the negative as an antithetic word does not occur to us to express that something necessary to constitute a thing is not a part of it. Petitioner surmounts the difficulty by contending that the law by its words "any part" of any of the "shells," implies a substantially finished part, as related to the whole structure and to the purpose it is intended to subserve. "Otherwise," counsel say, "the word [part] loses all precision, and becomes equivalent to the words 'ingredient' or 'material composing or making up.'" And to sustain this view they take us to the dictionaries and to an enumeration of the processes to which the material must be subjected to make a forging, and those afterwards to prepare it for a shell. In this enumeration letters of the alphabet are used of which "A, B, C and H represent stages of development of the material prior to delivery" to the Midvale Company, and "D, E, F, G, I and K represent stages of development by Midvale after delivery to it." It is quite obvious of course, as counsel declare, that the forgings were "not shells; since a shell is a composite structure of several parts." But

counsel go farther and say that the forgings were "not parts of shells in any practical or legal sense, because their development was so far short—80%—of the point where they could be related to or combined with any other component of the shell structure, that they could not satisfy any fair meaning of the shell body unit as entering into the composite shell as a whole." We give counsel's words because we fear that by paraphrasing them we might not correctly represent their meaning and contention.

We reject the contention. Congress did not intend to subject its legislation to such artificialities and make it depend upon distinctions so refined as to make a part of a shell not the taxable "part" of the law. Besides petitioner understates its work. It did not deliver raw material to the Midvale Company. Certain processes had been performed on the material giving it a shape adapted to its destination. It was made cylindrical, hollow, with one end closed. It was rough, it is true, but an advance upon the raw material.

The progressive processes need not be enumerated. The lower courts have enumerated them, and the Court of Appeals describing them said that the "steps" six in all, were "progressive advances toward the chemical constituents, the shape, and the dimension required by, and essential to, the manufacture of shells in compliance with the contract." And the court distinguished the effect of the steps. With the fourth, it was said, the inspection by the French Government began; the fifth took the fluid metal (the result of the second step) from the possibility of use for general commercial purposes and by a forging process restricted the steel to the field of use for shells. By the sixth step this forging "was drawn to a length, and to an inside and outside diameter, which enabled the Midvale Steel Company to thereafter carry forward its twenty-nine progressive steps, which, with the six" of

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Counsel for Parties.

petitioner "were required . . . to complete the manufactured shell of the contract."

"Manifestly," as counsel for the Collector says, "the shell body was not completely manufactured by either of the companies which were engaged in its production" but "by the two acting together." And each therefore is liable for the profit it made, and judgment is

*Affirmed.*

MR. JUSTICE DAY and MR. JUSTICE VAN DEVANTER dissent.